(1) No. ____ Supreme Court, U.S. FILED

95-724 NOV 6 - 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondents.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

JONATHAN P. HIATT
General Counsel
Service Employees
International Union, AFL-CIO
1313 L St., N.W.
Washington, D.C. 20005
(202) 898-3200

HAROLD CRAIG BECKER*
Associate General Counsel
Service Employees
International Union, AFL-CIO
940 W. Adams, Suite 400
Chicago, Ill. 60607
(312) 455-1500

*Counsel of Record
Attorneys for Petitioner

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QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held that the Department of Labor's 55 year-old legislative regulation providing that an employee must be paid on a salary and not on an hourly basis in order to be classified as an executive, professional or administrative employee and therefore as exempt from the protections of the Fair Labor Standards Act was invalid as applied to public employees?

PARTIES TO THE PROCEEDINGS BELOW

The Plaintiffs in the District Court are listed in the footnote that follows[1]. The Defendant was the County of San Diego, California. All the Plaintiffs were the Appellees in the Court of Appeals and the Defendant was the Appellant.

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[1] Donald J. Aarons, Susan L. Abbey, Nancy W. Adams, Stacy Lynn Adams, Michael R. Adkins, Robert J. Ady, Nancy A. Aguilera, Irene B. Albert, Lorenzo W. Alejandria, Joseph R. Alkire, S. Sandra Allen, Michael D. Almer, Freida Ann Ammerman, Burt M. Anderson, Joan Marie Anderson, Ronald W. Anderson, Dorri Elizabeth Angier, Reginald G. Angquico, Michael R. Angus, Martha F. Anneler-Wasdyke, Rosalinda Arellanes, Julian Arellano, Sally F. Arguilez, Guadalupe Arteaga, Larry W. Austin, Mary Kristi Avastu, Fred Avila, Teresa K. Ayala, Arthur Badillo, Carole S. Badt, Nancy J. Bailey, Bob Baker, James Edwin Baker, Verlin A. Baldwin, Maralyn E. Bank, Orlando J. Barajas, Marla R. Barlow, Ronald Elliott Barnles, Debra Lee Barrett, Roderick M. Barrette, Johanna Frances Barry, Ronald Edward Barry, Peter G. Bartelt, Nancy A. Bartolomucci, Chris N. Basa, Gary L. Bass, Bonnie J. Bassett, Eugene Carl Basye, Ann M. Bate, Phillip A. Battaglia, George W. Bauer, Karen Jeanne Bebb, Robert Leland Beckett, Arthur George Bedore, Janet E. Behrens, Carlos C. Bejar, Renee V. Beland, Scott Belfield, Paul P. Benitez, Jack Oliver Benham, Peter J. Beres, Larry John Berggren, Vivencio L. Bersamina, Rosanne F. Bianchi, Elliott C. Binley, Sylvia L. Binley, Yvonne Elizabeth Birch, Carl G. Bishop, Michael Robin Bisson, Christopher H. Blair, Prudence Sue Blair, William R. Blanas, Donald H. Blevins, John S. Blocker, Larry Eugene Bodenhamer, Naomi Jean Boggus, Michael P. Bohy, Caesar Clark Bolchini, Frank Oscar Bold, George E. Bolduc, Jose Samuel Bonilla, Renee U. Bonner, Donna F. Bontemps, Rebecca S. Booth, Thomas E Bothast Jr., Carroll Osborne Boyd, Deborah Kay Branin, Margie W. Bremer, Dixie J. Brennick, Kay L. Bridges, Benjamin E. Brockman, Felecia A. Brown, Hilary K. Brown, Patricia Leah Brown, Thomas Brown, Donna Lee Buckner, Alan L. Buffington, Thomas E. Bunkley, Henry Burciaga, Peter H. Burgert, Sue Burner, Betty J. Burt, David L. Butler, Donald E. Byrd, Charles Ray Caballero, Lisa J. Caldwell, George C. Calloway, Consuelo Camarena, Margaret E. Cameron, David Brian Cammall, Steve C. Campbell, Dominic Matthew Camplisson, Brenda N. Canizalez, James A. Capon, Don J. Cappell, Joe Sanchez Cardenas, David W. Carey, Fred E. Carlson, Richard Allan Carlson, Geraldine Carmack, Lawrence E. Carolan, Gerald John Carrier, Gwen B. Carrier, Pablo Carrillo, William Dennis Carroll, Betty Lucille Carter, Michele K. Carter, Laurie Ann Cartwright, Enrique B. Castillo, James S. Cavey, Patricia C. Cawthon, Rudolph Dave Celaya Jr., J. Marc Cerda, Phyllis

Jean Chalmers, Charley C. Chaney, Barbara Ann Chanson, Stephen S. Chapin, Sally Elizabeth Chapman, Connie R. Chappell, Judy Lee Charest, Bernard Lloyd Chase, Bruce Wayne Chastain, Thomas J. Chifari, Lynn Choisser, Roger D. Christensen, Vickie L. Church, Thomas C. Clampitt, Richard O. Clark, Patricia Annette Clarke, Sharon A. Clasen, William V. Clasen, Ronald S. Claussen, Irene Cash Clayton, Lori L. Clemons, Neale F. Clifford, Dane Scott Clingan, Hilbert J. Coffey, Grant S. Cole, Charlaine M. Coleman, Eileen Conn, Thomas M. Connolly, Margaret L. Cook, Jimmie DeWayne Cooksey, Eugene D. Cooper, Marilyn P. Cornell, Geraldine Cota, Sherri A. Coughlin, Ruth Covill, Sonja M. Cox, Roberta J. Craig, Ronald J. Criqui, Joseph Cristarella, Emery W. Crite, Oliver Z. Cromwell, Keith A. Crosby, Everett W. Cunningham, William R. Dague, Linda A. Davidson, Glenn P. Davis, Joseph D. Davis, Willie M. Davis, Paul Arthur Davy, Dale Barclay Dawson, Jacquelyn K. Day, George R. Dean, Thelma Capati Deguzman, Raul Delatorre, Sherri D. Delmare, Robert L. Denny, Sidney E. Derenburger, Claudia Sue Dess, Mary Deuybungco, Kenneth J. Diamond, Roger K. Dixon, Delia Dominguez, Michael P. Dorsey, William M. Dorsey, Percell S. Downes, April India Drew, Deborah A. Duesler, Mark William DuHamel, Richard E. Duncan, Stephen K. Duncan, Donna Joan Dupree, Steven W. Durham, Nancy E. Dwyer, Daniel M. Early, Laurie Earlywine, Gerald L. Ebner, Jack W. Edington, Juanita H. Edwards, Marie C. Edwards, Manuel Elizondo, Bill Kerbow Ellis Sr., Rikki V. Ellwood, Amelia Jeanne Emerson, Jeanie K. Emigh, Gloria E. Estoland, Linda H. Evans, Susan G. Evans, Gary Franklin Fairbanks, Siu Cheong Fan, Elaine Carol Fay, James John Fay, Karen C. Featherson, Cathy R. Federoff, James William Feeley, Charles A. Feland, Everett T. Fenex, Jeanne M. Ferguson, Gilbert Fierro, John C. Finch, Martin Carl Fink, Darlene Shaw Finocchiaro, Paul J. Fishback, Ronald L. Flint, Conrado Flores, Judy Frances Flores, Charolette N. Flowers, Elizabeth A. Forrey, Virginia A. Forsythe, Pamela Francois, Katherine C. Franet, James M. Frank, Gary W. Freeman, Wayne R. Freeman, Valen T. French, Gwendolyn Joyce Freow, Randall Fried, Paul Allen Friedman, Dale E. Fritcher, Richard L. Frost, Joseph C. Fuentes, Robert S. Fuller, Mary H. Gable, Frank A. Gabrian, William Patrick Gage Jr., Thomas Joseph Gallagher, Thomas Jay Galloway, Dolores Gaona, Jose L. Garcia, Juanita Thomasine Garcia, Vedna M. Garcia, John Frank Garduno, Nicolasa B. Garrido, Julayne M. Gath, Paul T. Gaughen, Douglas L. George, Judy Marie Gervais, Anthony J. Gesiakowski, Jill Senne Giesick, David L. Giles, Jacquelyn Elizabeth Giles, Frank F. Gill, John A. Gillespie, Sandra Ann Gillins, Gregory A. Gjerde, Maria D. Gladin, Cathleen A. Glaser, Conny Rae Gojilde, Ellen Andrea Gold, Cynthia Sue Gomper-Graves, B. Charles Gonaver Jr., Myrna L. Gonzales, Grayson Goodall, Patricia A. Goodman, Florante R. Gonzales, Brian Scott Gordon, Enrico Gorman, John Michael Graham, Roger Eugene Graham, Kathleen M. Greco, Delores A. Green, Charles Greene, Lawrence H. Greenwald, Louise S. Gresham, Gary Jack Griffith, Elette M.

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Marraccini, Larry Kent Marshall, James Brent Martin, Jessie Martin, Martha Lyvonne Martin, Steven John Martin, Gloria B. Martinez, Michael A. Marx, George E. Matz, Douglas Craig Mauck, Elaine H. Maxey, Ronald V. May, Maureen S. McArdle, George E. McCandless, Delmont J. McClain, Elorse W. McClain, Christine Michele McCracken, Florence Gay McCutcheon, Anna Y. McElroy, Jack Addison McGee, Dennis L. McGraw, Charlene E. McGriff, Dean Evan McKellep, Loretta Marie McKinney, Patrick Richard McKinney, Mary Celeste McLellan, Constance Leah McMahon, Linda L. McMorran, John W. McVey, Gretchen W. Medley, Charles H. Merritt Jr., Diane E. Messier, Martha S. Meurer, Virgil I. Michael, Steven Mihalek, Cassandra R. Miller, Ronnie L. Miller, Elisa D. Mitchell, Heidi L. Mixon, Lisa D. Mixon, Mary Victoria Moore, Penelope F. Moore, Barbara Louise Morse, Janet C. Moyer, Margaret Mary Mudd, Larry M. Muir, Diana Mullin, Frank W. Munger, Luis A. Muniz-Rivera, Rafael L. Munoz, Llewelyn Keith Munter, Mary Elisabeth Murphy, Patricia A. Murrin, Loreto Navarro Negado, Elizabeth E. Nelson, Rosemarie Neth, Lorraine M. Newbrough, Chuong K. Nguyen, Cheryl J. Nickolei, Jon H. Nielsen, Tahmoores Nikzadeh, John P. Nimesgern, Patricia Susan Ninich-Salazar, Toyo Nishii, Carol A. Norman, Rosalie C. Norton, Elizabeth Suzan Obrien, Jeannette Anita Obrien, Cathy Irene Olow, Ignacio B. Orias, Franklin A Over Jr., David Robert Oyos, Robert Raymond Pacheco, Sylvia Anne Padilla, Rosa M. Pagala, Mark S. Palmer, Rodrick E. Palmer, Gabriel Paramo, Judith C. Park, James Richard Parker, Stephen Pasarilla, Norman A. Pawchuk, Russell Henry Paxton, Patricia A. Payne, Norman C. Peet, Edgardo Reyes Penaflor, Neil F. Pere, John W. Pergrin Jr., Lisa Marie Petersen, Patricia Jeanne Petersen, Mary C. Peters, Bruce M. Phillips, Fielding T. Phillips, Nola J. Picht, Andrea Pineda, David J. Pitts, Robert L. Platt, Antoinette M. Polak, Earleen Ann Polick, Judith A. Pollard, John Porter, Michael Glenn Porter, Richard Charles Porter, Neil R. Poulsen, Marilyn S. Powell, Mary K. Pressley, Bernice G. Pritchett, Kenneth M. Purvis, Eugene David Quigley, Linda A. Quinones, Diane M. Radican, Elvira Miranda Ramirez, Daniel Marc Rapoport, Kathy K. Rathbun, Richard Ray Rathbun, Maureen Diane Rathburn, Wendy E. Ratner, Dolores A. Reaves, Richard Allen Reddic, Marlene M. Reed, Nancy Joy Reinhardt, Susan C. Rengel, James V. Reynolds, Michael W. Rhea, Domingo P. Ricasa, Gregory Wayne Richards, Wayne E. Richards, Richard Ray Richardson, Edna M. Rickling, Theresa A. Riis, Randall Thomas Robinson, Linda Lorene Rodgers, Paula M. Rodgers, Helen C. Rodgerson, Donna Louise Rodriguez, John Q. Rodriguez, Jose Daniel Rodriguez, Sonia Migdalia Rodriguez, Janet M. Rogers, Jane Elizabeth Romita, Efrain Rosario, Lynn B. Rowland, Mary Helen Rubalcava, Marianne Carole Ruckle, Charles E. Rudolph, Kristi L. Rudy, Michael Anthony Russo, Lynn Catherine Ruwe, Ann Elise Ryder, Nancy R. Saint John, Abraham V. Salazar, Frank R. Salerno, Brian Andrew Salmon, Benjamin Sanchez, Phyllis

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Schor, Juliet B., *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 Chi.-Kent L. Rev. 157 (1994) 10

Miscellaneous

Opinion Letter No. 1700, [1989-1990 Transfer Binder] *Lab. L. Rep.*(CCH) para. 31,770 at 43,2126 (July 27, 1989) 17

Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THIS CASE

The United States District Court for the Southern District of California granted two motions for partial summary judgment in favor of the Plaintiffs and one motion for summary judgment in favor of the Plaintiffs on April 23, 1991; February 11, 1992; and August 5, 1992, respectively. A. 47-79a (the Order of February 11, 1992 is reported at 784 F.Supp. 1503 (S.D.Cal. 1992)). The Order of February 11, 1992, holding that Plaintiffs were not exempt from the coverage of the Fair Labor Standards Act [hereinafter FLSA], 29 U.S.C. §§ 201 et seq., because they had not been paid on a salary basis is at issue here. The United States Court of Appeals for the Ninth Circuit reversed this Order on October 5, 1994. A. 30-46a (the decision is reported at 35 F.3d 483 (9th Cir. 1994)). The Court denied Plaintiff's petition for rehearing and rehearing en banc and granted, in part, Defendant's petition for rehearing on July 19, 1995. A.1-29a (the decision is reported at 60 F.3d 1346 (9th Cir. 1995)). The Court denied Plaintiff's petition for rehearing on August 7, 1995. A.80a.

JURISDICTIONAL GROUNDS

The Court of Appeals entered its judgment on July 19, 1995, and denied Plaintiffs' petition for rehearing on August 7, 1995. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

This case involves construction of § 213(a)(1) of the Fair Labor Standards Act and 29 C.F.R. §§ 541.1, 2, 3 and 118(a):

The provisions of section 206 ... and 207 of this title shall not apply with respect to —

(1) any employee employed in a bona fide executive, administrative, or professional capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary ....). 29 U.S.C. § 213(a)(1).

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

... and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week. 29 C.F.R. § 541.1.

The term *employee employed in a bona fide * * * administrative * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

... and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week. 29 C.F.R. § 541.2.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the Act shall mean any employee:

... and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $170 per week. 29 C.F.R. § 541.3.

An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he

performs any work without regard to the number of days or hours worked. 29 C.F.R. § 118(a).

STATEMENT OF THE CASE

STATEMENT OF FACTS

Plaintiffs are employees of Defendant County of San Diego. They work in a variety of classifications, including deputy probation officer, intermediate clerk typist, and senior park ranger. The County has treated the Plaintiffs as exempt from the protections of the FLSA. They have thus not been paid for overtime work at the statutorily required rate of one and one-half times their regular rate.

STATEMENT OF PROCEEDINGS BELOW

Plaintiffs' Complaint alleged a violation of the FLSA. They moved for summary judgment on the grounds that they did not qualify for exemption because they were not paid on a salary basis. The District Court granted the motion. The Court of Appeals reversed on the grounds that the regulation containing the salary test was invalid as applied to public employees.

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 1343 and 29 U.S.C. § 216(b).

ARGUMENT

INTRODUCTION

In this case, the Ninth Circuit struck down a legislative regulation promulgated by the Department of Labor [hereinafter DOL] 55 years ago pursuant to its statutory authority to "define[] and delimit[]" the principal exemptions to the FLSA. *See* 29 U.S.C. § 213(a)(1).

The FLSA's protections do not reach "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary)." *Id.* Since 1940, the DOL has "defined and delimited" these statutory terms using two tests: a duties and a salary basis test. *See* 5 Fed. Reg. 4077 (1940) §§ 541.1(e), .2(a), .3(b).[2] These tests are currently codified in 29 C.F.R. §§ 541.1-.3. Under these tests, employees are not exempt unless they both perform the duties of an executive, administrative or professional employee and are paid on a salary as opposed to an hourly basis.[3]

While the FLSA as enacted in 1938 did not apply to public employees, in 1966, 1974, and 1985, Congress extended the Act's protections to government workers. While tailoring the Act's requirements to the public sector in other respects, in none of these amendments did Congress alter the DOL's salary test for exemption as applied to public employees. Nevertheless, 55 years after the regulation was promulgated and 26 years after it was first applied to public employees, the Ninth Circuit struck it down as so applied.

After this case arose, the DOL itself amended the salary basis test as applied in the public sector. But the agency "did not eliminate altogether the 'salary basis' test in the public sector." 57 Fed. Reg. 37,671 (1992). Rather, the DOL eliminated only one

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[2] In 1949, the DOL amended the regulation to specify, in a manner substantially identical to the present 29 C.F.R. § 541.118(a), precisely what it meant to be paid on a salary basis. *See* 14 Fed. Reg. 7730, 7735 (1949). Finally, in 1954, the DOL further elaborated the test in the form at issue here. *See* 19 Fed. Reg. 4405, 4406 (1954).

[3] The only exceptions to this are employees who hold a license or certificate to practice law or medicine and who are actually engaged in the practice of those professions, medical interns and residents, and teachers. *See* 29 C.F.R. § 541.3(e).

element of the salary basis test as applied to public employees — the requirement that exempt employees not be docked pay for absences of less than one day. *See* 29 C.F.R. § 541.5d. The Ninth Circuit's holding is far broader. The Court held that "the salary test ... was invalid in its entirety as it applied to the public sector." A.13a (emphasis added).[4] The holding is inconsistent with the DOL's action and thus with the continued application of the salary basis regulation to public employees. [5] The question of whether the salary basis regulation is valid as applied to public employees is currently before this Court in two other petitions in *Mueller v. Reich,* Case No. 95-586 and *Michigan Supervisors' Office & Professional Employees Int'l Union v. Michigan Department of Corrections,* Case No. 95-688.

I. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THOSE OF OTHER COURTS OF APPEAL

The decision of the Ninth Circuit is in conflict with the holdings of six of the 11 other Courts of Appeal and its rationale has been expressly rejected by two Courts of Appeal.

1. The decision of the Ninth Circuit is in conflict with the express holdings of the Seventh and District of Columbia Circuits. [6] The Seventh Circuit in *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed,* Case No. 95-586, held that the

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[4] The District Court held that there were five elements to the salary test: the employees must not (1) be docked for absences of less than one day, (2) be paid extra for additional hours worked in one day, (3) work set hours and record their time on an hourly basis, (4) be subject to suspensions without pay for reasons other than major safety violations, and (5) have their compensation calculated by multiplying hours worked times rate of pay. A.67-71a. Elements one, two and four are grounded in the express terms of the regulation, *see* 29 C.F.R. § 541.118(a)(1), (5) and (b). The others are the results of judicial construction of the regulation. *See* cases cited in A.67-71a.

[5] For these reasons, the DOL filed a brief as amicus curia in the Court of Appeals in support of Plaintiffs' petition for rehearing en banc. *DOL Brief in Support of Petition for Rehearing.*

salary basis test was not invalid in its entirety as applied to public employees. In that case, the Court upheld the application of the revised salary test to public employees. Specifically, the Court held that one element of the test — that salaried employees may not be subject to disciplinary suspensions for infractions other than violations of safety rules of major significance — could be applied to public employees. *See* 29 C.F.R. § 541.118(a)(5). The Seventh Circuit found nothing problematical about applying this element of the salary basis test to public employees.

> Neither the principle of public accountability, nor any other principle of public administration that has been drawn to our attention, makes it imperative that public employers have this power with respect to their executive, administrative, and professional employees. ... So far as we know, there is nothing peculiar to the culture or customs or conditions of public employment that necessitates these penalties. ... [T]he rule barring such suspensions does not impose an insuperable obstacle to states' bringing their executive, administrative, and professional employees within the exemption. 54 F.3d at 442-43.

The Seventh Circuit's holding that this element of the salary basis test was validly applied to public employees is inconsistent with the Ninth Circuit's holding that "the salary test ... was invalid in its entirety as it applied to the public sector. No part of that test remains valid in this context." A.42a (emphasis added).[7]

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[6] The issue of the validity of the salary test as applied to public employees is currently pending before both the Sixth and Eleventh Circuits. See *Jackson v. Kentucky*, Nos. 95-6283 and 6284 (6th Cir.); *Freeman v. Mobile*, No. 94-7171 (11th Cir.).

[7] This finding was essential to the Ninth Circuit's holding because the District Court expressly held that the Plaintiffs did not satisfy any element of the salary test — including the element relating to disciplinary suspension — and were therefore not paid on a salary basis even after the County stopped docking their pay for absences of less than one day. A.67-71a.

The Ninth and Seventh Circuits' decisions are in conflict on the question of whether any element of the salary test can be validly applied to public employees.

In *Kinney v. District of Columbia*, 994 F.2d 6 (D.C.Cir. 1993), the District of Columbia Circuit, unlike the Ninth Circuit, refused to consider the argument that the salary basis test is invalid as applied to public employees when it was raised for the first time on appeal. *Compare A.6-7a with Kinney*, 994 F.2d at 9-10. More importantly, in so doing, the District of Columbia Circuit rejected the very foundation of the Ninth Circuit's holding. The Ninth Circuit's holding rests on the conclusion that the DOL's revision of the salary test "is evidence that the pre-1991-1992 salary test is not reasonably related to the executive and administrative exemption, as applied to the public sector." A.11a. The Ninth Circuit held that the revision "is indicative of [the agency's] firm conviction that its earlier iteration of the salary test conflicted with congressional intent." A.12-13a. In contrast, the District of Columbia Circuit held that the revision "cannot be taken to mean . . . that DOL declared its own regulation contrary to the statute and invalid *ab initio.*" *Kinney*, 994 F.2d at 10. [8] After quoting this language from *Kinney*, the Ninth Circuit stated clearly, "We disagree." A.12a.

Under these conflicting rulings, employees of the City of San Francisco whose pay was docked for absences of less than one day prior to the DOL's revision of the salary basis regulation and who continue to be subject to short disciplinary suspensions without pay after the revision may be treated as exempt from the protections of the FLSA during both periods while the same employ-

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[8] The District of Columbia Circuit's construction of the DOL's revision of the test is consistent with the construction of the DOL itself as set forth in the Department's brief as amicus curiae in the Ninth Circuit. As the DOL succinctly informed the Court, the Court "imputed an intention to the Secretary that he did not share." *DOL Brief in Support of Petition for Rehearing* at 3.

ees if they were employed by the City of Chicago or the District of Columbia would be fully protected by the FLSA during both time periods.

2. The decision of the Ninth Circuit is in conflict with the holdings of six of the other 11 Circuits. Since Congress amended the FLSA in 1985 to apply to public employees, 10 of the 11 other Courts of Appeal have applied the salary test for exemption to public employees and held that the employees were protected by the Act because they failed the test. *See* 2d Cir: *Whitmore v. Port Authority,* 907 F.2d 20 (2d Cir. 1990); 4th Cir.: *Allen v. County of Fairfax,* 127 Labor Cas. para. 33,049 (4th Cir. 1994); *Shockley v. Newport News,* 997 F.2d 18 (4th Cir. 1993); 5th Cir.: *York v. Wichita Falls,* 944 F.2d 236 (5th Cir. 1991); 7th Cir.: *Bankston v. Illinois,* 60 F.3d 1249 (7th Cir. 1995); *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed,* Case No. 95-586; 11th Cir.: *Avery v. Talladega,* 24 F.3d 1337 (11th Cir. 1994); D.C.Cir.: *Kinney v. District of Columbia,* 994 F.2d 6 (D.C.Cir. 1993). [9] Implicit in each of these decisions is a holding

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[9] The following district courts have also applied the test to public employees and found them to be nonexempt: *Bowman v. Indianapolis,* 892 F.Supp. 212 (S.D.Ind. 1995); *Abbey v. Jackson,* 883 F.Supp. 181 (E.D.Mich. 1995); *Arrington v. Macon,* 864 F.Supp. 1345 (M.D.Ga. 1994); *Lucero v. University of California,* 1993 U.S.Dist.Lexis 12208 (N.D.Cal. Aug. 23, 1993); *Yourman v. Dinkins,* 826 F.Supp. 736 (S.D.N.Y. 1993); *Baker v. Pomona,* 1993 U.S.Dist.Lexis 19548 (C.D.Cal. Aug. 4, 1993); *Burton v. San Mateo,* 1992 U.S.Dist.Lexis 14690 (N.D.Cal. Aug. 26, 1992); *Lacey v. State Police Dep't.,* 810 F.Supp. 244 (S.D.Ind. 1992); *Benzler v. Nevada,* 804 F.Supp. 1303 (D.Nev. 1992); *Thomas v. County of Fairfax,* 803 F.Supp. 1142 (E.D.Va. 1992), aff'd mem., 16 F.3d 408 (4th Cir. 1994); *Alex v. California,* 1992 U.S.Dist.Lexis 6795 (E.D.Cal. Mar. 18, 1992); *Paulitz v. Naperville,* 781 F.Supp. 1368 (N.D.Ill. 1992); *Thomas v. County of Fairfax,* 758 F.Supp. 353 (E.D.Va. 1991); *Harrison v. District of Columbia,* 30 W.H.Cases 557 (D.D.C. 1991); *Rhinebarger v. Furnas,* 1991 U.S.Dist.Lexis 21147 (S.D.Ind. Sept. 27, 1991); *Wilks v. District of Columbia,* 721 F.Supp. 1383 (D.D.C. 1989); *Wilson v. Charlotte,* 717 F.Supp. 408 (W.D.N.C. 1989), *rev'd on other grounds,* 964

that the test is valid as so applied. Only the Ninth Circuit has held that the test is invalid as applied to public employees.[10]

The Ninth Circuit's decision therefore conflicts with the holdings of six other Courts of Appeal and with the express reasoning of two other Courts of Appeal.

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The exemptions for executive, professional and administrative employees are the broadest exemptions from the minimum wage and maximum hour protections of the FLSA. *Compare* 29 U.S.C. § 213(a)(1) with §§ (a)(2)-(15) and (b). Since 1940, the DOL has construed the exemptions as not encompassing any employees[11] who are paid on an hourly basis.

If it were to become the law of the land, the Ninth Circuit's decision would eliminate the salary basis requirement for exemption for the approximately 19 million public employees in this

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F.2d 1391 (4th Cir. 1992); *Banks v. North Little Rock*, 708 F.Supp. 1023 (E.D.Ark. 1988); *Nixon v. Junction City*, 707 F.Supp. 473 (D.Kan. 1988); *Hawks v. Newport News*, 707 F.Supp. 212 (E.D.Va. 1988); *Persons v. Gresham*, 704 F.Supp. 191 (D.Or. 1988); *D'Camera v. District of Columbia*, 693 F.Supp. 1208 (D.D.C. 1989); *Knecht v. Redwood City*, 683 F.Supp. 1307 (N.D.Cal. 1987); *Schuller v. Livermore*, 1987 U.S.Dist.Lexis 14483 (N.D.Cal. Apr. 22, 1987).

[10] *See also Jackson v. Kentucky*, 892 F.Supp. 923 (E.D.Kent. June 21, 1995), *appeal docketed*, Nos. 95-6283 and 6284 (6th Cir. Sept. 27, 1995); *Freeman v. Mobile*, 1994 U.S.Dist.Lexis 15672 (S.D.Ala. Oct. 27, 1994), *appeal docketed*, No. 94-7171 (11th Cir. Dec. 14, 1994); *McGrath v. Philadelphia*, 864 F.Supp. 466 (E.D.Pa. 1994); *Stewart v. City & County of San Francisco*, 834 F.Supp. 1233 (N.D.Cal. 1993), all of which hold the salary basis test invalid as applied to public employees.

[11] With the exception of medical and legal and educational professionals discussed supra.

country. *See* Bureau of Labor Statistics, *News; Employment Situation: September 1995*, Table B-1 (Oct. 6, 1995). The decision would thus significantly broaden the scope of the primary exemptions. But as this Court has repeatedly emphasized, "Breadth of coverage" is "vital to [the Act's] mission," *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950), and, correspondingly, the statutory exemptions should be "narrowly construed." *Mitchel v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).

The broadening of the primary exemptions from the FLSA's protections would occur at a time of dramatic increase in the number of hours worked by Americans. *See* Laura Leete & Juliet B. Schor, *Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969-1989*, 33 Indus.Rel.L.J. 25, 31 (1994)(finding hours of paid work per year increased by 138 between 1969 and 1989). In fact, the leading scholar of work time in the country, Juliet B. Schor of Harvard University, has recently endorsed repeal of the executive, professional and administrative exemptions as a partial solution to the serious work-family conflicts being experienced by many Americans as a result of increasing work hours. *See* Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 Chi.Kent.L.Rev. 157, 170 (1994).

The validity of the salary test for exemption as applied to public employees is thus an important question of federal law which has not been but should be settled by this Court.

III. THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

In four respects, the Ninth Circuit departed from the principles established by this Court for judicial review of "legislative

regulations."[12]

1. In *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court held that courts should not invalidate legislative regulations unless they conflict with the "unambiguously expressed intent of Congress" or are not "based on a permissible construction of the statute." *Id.* at 842-43. Under Chevron, "such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844.

a. Congress has not expressed an intention that the salary test not apply in the public sector. Neither the original Act nor any subsequent amendment mentions the test's application to public employees and the legislative history is similarly silent. The Ninth Circuit acknowledged that Congress has been "silent as to whether the . . . salary test should apply to the public sector." A.8a.

Despite this acknowledgment, however, the Ninth Circuit relied on one ambiguous piece of legislative history in concluding that the salary test as applied to public employees "conflicted with congressional intent." A.11a. The Ninth Circuit cites language in the House Report on the 1974 amendments to the FLSA stating, "the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector." A. 8a, 10a *(quoting H.R.Rep. No.* 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837) (emphasis added). The Ninth Circuit assumes that the Report is referring to

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[12] This Court has used the term "legislative regulations" in relation to those regulations that are the product of "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). The FLSA contains such an express delegation in relation to the definition of executive, professional, and administrative employees. See 29 U.S.C. § 213(a)(1).

the executive, professional and administrative exemptions when it uses the term "non-supervisory." A.8a. The Ninth Circuit then reasons that because application of the salary test prevents public employees from qualifying for exemption, it is inconsistent with congressional intent that "public sector employers be able to claim the [exemptions]." A.11a.

The Ninth Circuit's logic is flawed in four respects. First, as this Court held in *Chevron*, "the general remarks pointed to by [the lower Court] 'were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire.'" *Id.* at 862 (quoting *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 168-69 (1945)). Second, the single sentence of legislative history is more fairly read to evidence congressional intent that the exemptions apply in the public sector as "defined and delimited" by the DOL. Third, even if these definitions did narrow the exemptions in the public sector, this would be consistent with Congress' clear intent that the exemptions be "narrowly construed." *See Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Congress has never vested in any employer an absolute right to treat some of its employees as exempt.

Finally, the salary test does not prevent all or even nearly all public employees from qualifying for exemption. The Ninth Circuit's finds: "because virtually all public employers are constrained by pay systems based on public accountability [to dock employees' wages for any absence], public employees could not satisfy the salary test." A.10a. But this finding of legislative fact is clearly erroneous and not supported by the one relevant piece of evidence in the record.

This Court need look no farther than its own chambers to see that the finding is erroneous. Judicial clerks are public employees, but their wages are not docked if they come in an hour late

one morning. Clerks are professionals and satisfy all the criteria for exemption on that basis, including being paid on a salary basis. Judge's honor the principle of public accountability by evaluating their clerks' performance rather than their attendance. Therefore, clerks, among other public professional, executive and administrative employees can and do satisfy the salary test.

In fact, many federal courts have found that public employees were paid on a salary basis.[13]

In this very case, undisputed evidence in the record demonstrates that the County altered its pay practices effective March 8, 1991, to bar the docking for partial day absences of those employees the County considered exempt. A.69a. Thus even the public

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[13] *See Michigan Supervisors' Office & Professional Employees Int'l Union v. Department of Corrections*, 1995 U.S.App.Lexis 19956 (6th Cir. July 13, 1995), *petition for cert. filed*, Case No. 95-688; *Auer v. Robbins*, 1995 U.S.App.Lexis 25241 (8th Cir. May 17, 1995); *Bennett v. Albuquerque*, 1995 U.S.App.Lexis 8901 (10th Cir. April 18, 1995); *Michigan Ass'n of Governmental Employees v. Michigan*, 1995 U.S.Dist.Lexis 4464 (W.D.Mich. Jan. 27, 1995); *Aaron v. Wichita*, 54 F.3d 652 (10th Cir. 1995); *Quirk v. Baltimore County*, 1995 U.S.Dist.Lexis 12118 (D.Md. Aug. 18, 1995); *Wineland v. Dorchester County*, 892 F.Supp. 719 (D.Md. 1995); *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C.Cir. 1994); *Barner v. Novato*, 17 F.3d 1256 (9th Cir. 1994); *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Schmitt v. Kansas*, 864 F.Supp. 1051 (D.Kan. 1994); *Ackley v. Department of Corrections*, 844 F.Supp. 680 (D.Kan. 1994); *Aly v. Butts County*, 841 F.Supp. 1199 (M.D.Ga. 1994); *McDonnell v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 1145 S.Ct. 1188 (1994); *Michigan Ass'n of Governmental Employees v. Department of Corrections*, 992 F.2d 82 (6th Cir. 1993); *Sullivan v. Phoenix*, 845 F.Supp. 698 (D.Ariz. 1993); *Kuchinskas v. Broward County*, 840 F.Supp. 1548 (S.D.Fla. 1993); *Ahern v. New York*, 807 F.Supp. 919 (N.D.N.Y. 1992); *Simmons v. Fort Worth*, 805 F.Supp. 419 (N.D.Tex. 1992); *Masters v. Huntington*, 800 F.Supp. 363 (S.D.W.Va. 1992); *Keller v. Columbus*, 778 F.Supp. 1480 (S.D.Ind. 1991); *International Ass'n Of Fire Fighters v. Alexandria*, 720 F.Supp. 1230 (E.D.Va. 1989); *Hartman v. Arlington County*, 720 F.Supp. 1227 (E.D.Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *Harris v. District of Columbia*, 709 F.Supp. 238 (D.D.C. 1989); *D.C. Nurses Ass'n v. District of Columbia*, 29 W.H.Cases 868 (D.D.C. 1988); *Joiner v. Macon*, 647 F.Supp. 718 (M.D.Ga. 1986).

employer in this case was not "constrained by [a] pay system[] based on public accountability" so that its "employees could not satisfy the salary test." A.10a. The County, like other public employers, could and did choose to bring its pay practices into conformity with the docking element of the salary test.

The salary test does not conflict with the "unambiguously expressed intent of Congress."

b. In striking down the 55 year-old, legislative regulation, the Ninth Circuit never inquired into its purpose. Such an inquiry makes it clear that the salary basis regulation is based on a "permissible construction of the statute."

The logic of the salary test becomes apparent if one asks why professional, executive and administrative employees are exempt from the protections of the FLSA. Congress did not exempt these employees simply because they tend to be relatively highly paid.[14] This could more easily have been accomplished by basing exemption on pay rates. Nor did Congress exempt all non-manual laborers. This could also have been done more directly. [15]

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[14] The DOL explained when it first adopted the salary test in 1940:

> "A ceiling for hours" is just as much an independent objective of the Act as a "floor for wages," and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum.

*DOL, "Executive, Administrative, Professional * * * Outside Salesman" Defined — Rep. And Rec. Of the Presiding Officer at Hearings Preliminary to Redefinition* (Oct. 10, 1940), *reprinted in Wage and Hour Manual* (BNA) 679-80 (Cum. Ed. 1944-45).

[15] In its 1944 Report, the DOL persuasively rejected the argument that Congress intended to exempt all "white collar workers." *DOL, "Executive, Professional,"* at 678. "Under the contrary opinion the specific statutory exemptions for named groups ... would not be needed ... Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in § 13(a)(1) of the Act. The theory of general exemption is further negated by the grant of power to the Administrator to *define* and *delimit* those terms." *Id.*

Instead, Congress exempted three distinct categories of employees. What do these three types of employees have in common? — the answer is they generally control their own time.[16] They are compensated not for the number of hours they work but based on the "general value of the services performed." *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

Being paid a salary is thus more than simply a proxy for performing professional, executive or administrative duties. It is the essence of why these three categories of employees are exempt. It makes sense to exempt employees who are paid a salary from the overtime provisions of the Act[17] because they control their own time and are therefore not subject to the abuses Congress aimed to eradicate by discouraging long hours. A comparison of young accountants and skilled steelworkers is illustrative. Accountants may work over 40 hours in a week, but they choose when to come to work and can take a break during the afternoon to attend to personal business. Steelworkers may work no more hours in the week and may even be paid the same as young accountants, but because steelworkers do not control their own time (they cannot come and go as they choose), their long hours are more oppres-

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[16] Just four years after it adopted the test, the DOL explained, "it is well recognized that bona fide executive, administrative, and executive employees are normally allowed some latitude with regard to the time spent at work." *DOL, Wage and Hour Release No. A-9* (Aug. 24, 1944), *reprinted in* Wage and Hour Manual (BNA) 719 (Cum. Ed. 1944-45).

[17] The salary test is primarily relevant to the overtime provisions of the Act because professional, executive and administrative employees are unlikely to be paid less than the minimum wage. The DOL attempted to insure this by requiring that all exempt employees be paid a minimum salary above the minimum wage, but the amendment has been deferred by presidential action. *See* 46 Fed. Reg. 3,013 (1981); 46 Fed. Reg. 11,972 (1981). Currently only the regulation governing professionals provides for a minimum weekly salary of $170 (40 times $4.25). *See* 29 C.F.R. §§ 541.1(f), .2(e)(1) and .3(e).

sive and were the target of the FLSA. [18]

This logic applies whether the employee is a private or a public employee. Public white collar workers who are forced to punch a clock for reasons of "public accountability" suffer as a result of excessive hours in much the same way as private production workers. The DOL was warranted in providing that employees who are not paid on a salary basis, for whatever reason, should not be exempt from the overtime provisions of the Act. The salary test "is a reasonable choice within the gap left open by Congress." *Chevron*, 467 U.S. at 866.

c. Despite the clear instructions of *Chevron*, the Ninth Circuit held that the salary basis regulation was "entitled to no deference at all" as applied to public employees. A.25a. The Court attempts to ground this express departure from precedent on (i) the DOL's failure to immediately either repromulgate or revise the regulation after the FLSA was extended to protect public employees and (ii) the DOL's eventual revision of the salary test as applied to public employees. The Ninth Circuit's reasoning fails to justify its departure from *Chevron*.

The Ninth Circuit reasons that the DOL had a duty to reconsider the salary test after the extension of the FLSA to protect pub-

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[18] The Seventh Circuit in *Mueller*, unlike the Ninth Circuit, grasped this logic:

> Remember that the issue is entitlement to overtime pay (at the statutory rate of 1.5 times regular pay). There is little purpose in paying overtime if the express or implied contract of employment does not fix specific hours of work, the employee being expected to do as much work (within reason) as necessary to carry out his responsibilities rather than to work exactly the same number of hours day after day. If the employer docks the employee's pay for an absence of a few hours on a particular day, the implication is that the employee really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute. That is the logic behind the original provision. 54 F.3d at 442.

lic employees and that the DOL "defaulted on its mandate." A.19a. This principle implies that an agency has a duty to revisit and repromulgate the entire body of regulations it has promulgated under a statute every time the statute's coverage is extended on pain of forfeiting all judicial deference. This Court has never endorsed such a destabilizing principle.

Moreover, the application of the Ninth Circuit's destabilizing principle to the extension of the FLSA is particularly inappropriate because Congress itself tailored the law to accommodate the special needs of public employees in 1985. The House Report on the 1985 amendments states that Congress recognized that it was "essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and fairly accommodated." *H.R. Rep. No. 99-331,* 99th Cong., 1st Sess. 17 (1985). The amendments accommodated public employers in several respects. For example, Congress allowed public police and fire departments to place employees on shifts of longer than 40 hours per week without paying them at the statutory overtime rate and also allowed all public employers to substitute compensatory time off for cash overtime compensation. *See* 29 U.S.C. § 207(k),(o). But Congress did not alter the salary test for exemption as it applies to public employees. [19] The Ninth Circuit erred when it imposed a duty on the DOL to reenact or revise all its regulations as applied to public employees when Congress has already determined how the "particular needs" of public employers should be accommodated.

The Ninth Circuit also reasoned that when the DOL revised

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[19] The DOL recognized in a 1989 Opinion Letter, "Congress took specific action to recognize special State and local government employment situations, but took no action to modify the application of the ... exemption[s] of FLSA to the public sector." Opinion Letter No. 1700, [1989-1990 Transfer Binder] Lab.L.Rep.(CCH) para. 31,770 at 43,2126 (July 27, 1989).

the salary basis regulation as applied to public employees in 1991, the DOL concluded that its earlier regulation was invalid. The Ninth Circuit then defers to this implicit conclusion which it attributes to the DOL while refusing to defer to the agency's explicit judgment in the revised regulation that some portions of the salary basis test are validly applied to public employees. A.24-25a. There are three problems with this reasoning. First, it is inconsistent with this Court's holding in *Chevron* that "the fact that the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute." *Id.*, 467 U.S. at 863. This holding cannot be read to mean that only the last interpretation is entitled to deference. Such a reading would impair the very regulatory flexibility this Court was attempting to promote by forcing an agency to consider the potential destabilizing impact of the courts overturning its prior regulation every time the agency promulgates a revised regulation.

Second, the DOL informed the Ninth Circuit that it did not conclude that the unrevised salary regulation was invalid as applied to public employees and that it disagrees with such a conclusion. *See DOL Brief in Support of Petition for Rehearing.*

Finally, even accepting the Ninth Circuit's principle that only the final regulation is entitled to deference, the Court's holding is inconsistent with that principle because the DOL did not eliminate every element of the salary test as applied to public employees, but rather only one element of the test.

2. In *NLRB v. Aerospace Co. Div. of Textron*, 416 U.S. 267 (1974), this Court held that when an agency has a "longstanding interpretation" of a statute and Congress extends or re-enacts the statute "without pertinent change," Congress' failure to revise or repeal the agency's interpretation is "persuasive evidence that the interpretation is the one intended by Congress." *Id.* at 274-75 (1974).

The DOL first promulgated the salary test in 1940. Congress extended the FLSA to cover public hospitals, schools, and mass transit carriers in 1966 and then broadened the Act's application to virtually all public employees in 1974. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985). After the Act was struck down as so applied in *National League of Cities v. Usery*, 426 U.S. 833 (1970), and then upheld in *Garcia*, Congress re-enacted the law as applied to public employees. *See* Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985). Therefore, Congress has three times extended the FLSA to cover public employees since the promulgation of the salary test without questioning the test's applicability to them. This is "persuasive evidence" that Congress intended the salary test to apply to public employees.

3. In *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982), this Court held, "Where 'an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *Id.* at 535 (*quoting United States v. Rutherford*, 442 U.S. 544, 555 n.10 (1979)(*quoting Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)). Three times since the FLSA was extended to public employees, Congress has considered the salary test. In 1990 and 1993, Congress amended the test as it applies to computer programmers and employees taking leave under the Family and Medical Leave Act. *See* Pub.L.No. 101-583, § 2, 104 Stat. 2871 (Nov. 15, 1990); Pub.L.No. 103-3, § 102(c), 107 Sat. 6 (Feb. 5, 1993). But while Congress focused its attention on the salary test, it did not alter its application in the public sector. In 1991 and 1992, Congress specifically considered amending the FLSA to provide that the failure to pay public employees on a salary basis does not render them non-exempt. *See S. 3089*, 102d Cong., 2d Sess. (July 28, 1992); *S. 1670*, 102d Cong., 1st Sess. (Aug. 2,

1991); *H.R. 5112*, 102d Cong., 2d Sess. (May 7, 1992). Congress did not enact any of the three bills proposed to repeal the salary test as applied to public employees. This strongly suggests that "legislative intent has been correctly discerned" in the test.

4. In *Chevron* and again in *Rodriguez v. United States*, 480 U.S. 522 (1987), this Court held that it is Congress and the executive branch and not the courts that may choose between competing policies, compromising one to advance another. "[D]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525. "The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron*, 467 U.S. at 866. Faced with a case like this one in which the political branches have made such a choice, this Court has instructed that "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Id.* Yet in this case, the Ninth Circuit invalidated the salary test as applied to public employees not because it was inconsistent with the FLSA or any policy arguably embodied in the FLSA, but because it was allegedly inconsistent with principles of public accountability. Under *Rodriguez* and *Chevron*, the question of whether the values advanced by the FLSA should be "sacrificed" to the achievement of public accountability must be answered by the political branches. The Ninth Circuit lacked authority to compromise enforcement of the FLSA in order to accommodate a value not embraced by Congress in the statute.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN P. HIATT
General Counsel
Service Employees
International Union, AFL-CIO
1313 L St., N.W.
Washington, D.C. 20005
(202) 898-3200

HAROLD CRAIG BECKER*
Associate General Counsel
Service Employees
International Union, AFL-CIO
940 W. Adams, Suite 400
Chicago, Ill. 60607
(312) 455-1500

*Counsel of Record

Attorneys for Petitioner

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APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56249

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; Probation Officers Association; Roslinda Arellanes; Teresa Ayala;
Renee U. Bonner, et al.,

Plaintiffs-Appellees,

v.

COUNTY OF SAN DIEGO,

Defendant-Appellant.

Argued, Submission Deferred November 5, 1993.

Resubmitted September 22, 1994.

Decided October 5, 1994.

Order and Supplemental Opinion
July 19, 1995.

COUNSEL: Ian Fan, Deputy City Counsel, San Diego, California, Miriam E. Brewster, Deputy City Counsel, San Diego California, for the Defendant-Appellant.

Craig Becker, Service Employees International Union, Los Angeles, California, for the Plaintiffs-Appellees.

Jonathan V. Holtzman, Special Assistant to the City Attorney, San Francisco, California, for the Amicus.

Before: JAMES R. BROWNING, ROBERT R. BEEZER and STEPHEN S. TROTT, Circuit Judges. Opinion by JUDGE TROTT.

OPINION: ORDER, AMENDED OPINION AND SUPPLEMENTAL OPINION

TROTT, Circuit Judge:

Employees of the County of San Diego sued the County of San Diego ("County"), claiming it failed to pay overtime compensation in accordance with the Fair Labor Standards Act ("FLSA"). 29 U.S.C. §§ 201-219. The district court issued three orders granting partial summary judgment for plaintiffs. *See Service Employees Int'l Union, Local 102 v. County of San Diego,* 784 F. Supp. 1503 (S.D. Cal. 1992). The court held that plaintiffs were not exempt from FLSA coverage and that, as a matter of law, plaintiffs were entitled to overtime compensation for on-site back-

up duty. The County appeals, arguing the FLSA exemption should have precluded liability and that the employees' on-site stand-by time was not "work" as a matter of law.

We hold that the version of the "salary test" in existence prior to September 6, 1991 was invalid in its entirety as applied to the public sector. Thus, we reverse and remand to the district court for further proceedings consistent with this opinion.

I

County assistant deputy probation officers ("ADPOs"), nurses, and park rangers filed this suit against the County, claiming the County violated the FLSA by failing to pay them overtime for "on-site back-up duty," or "stand-by," time. The County defended by claiming plaintiffs were exempt from FLSA coverage.

The district court issued three orders granting partial summary judgment. On April 23, 1991, the court granted partial summary judgment for plaintiffs on their claim that ADPOs were eligible for overtime during their on-site back-up time. On February 11, 1992, the district court granted partial summary judgment concluding: 1) the three year statute of limitations applied because the County's violations were wilful; 2) the employees were entitled to liquidated damages; and 3) the County improperly exempted the ADPOs as salaried employees. On August 5, 1992, the court granted partial summary judgment, concluding: 1) liquidated damages and the three year statute of limitations should also apply to the nurses and park rangers; and 2) the court's holding in the April 1991 order should apply to nurses and park rangers.

II

The piecemeal nature in which this case was decided creates a jurisdictional question: whether the district court decision is final for purposes of 28 U.S.C. § 1291. "Under the final judgment

rule embodied in 28 U.S.C. § 1291, parties may appeal only the final decisions of the district courts. A final judgment ... is a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994) (quotation omitted). Partial summary judgment is not an inherently final order, *id.; Cheng v. Commissioner,* 878 F.2d 306, 309 (9th Cir. 1989), and the orders in the instant case are not final because the district court has not yet calculated damages.

The Supreme Court has held that the requirement of finality is to be given a practical construction. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964). In *In re Subpoena Served on the California Public Utilities Commission,* 813 F.2d 1473, 1479-80 (9th Cir. 1987), however, we observed that the "exercise of appellate jurisdiction in *Gillespie* was based upon the unique circumstances of the case" and noted that the decision should be applied "only sparingly." To satisfy the practical finality rule, the following factors must be satisfied:

> (1) the [decision appealed] was a "marginally final order," (2) [which] "disposed of an unsettled issue of national significance," (3) review "implemented the same policy Congress sought to promote in § 1292(b)," and (4) the finality issue was not presented to the [appellate court] until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue.

Id. at 1480 (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 477 n.30, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)); *accord Wabol v. Villacrusis,* 958 F.2d 1450, 1454 (9th Cir. 1990), *cert. denied,* ___U.S. ___, 113 S. Ct. 675, 121 L. Ed.2d 598 (1992).

The challenged orders are "marginally final" because the calculation of damages "will not affect the potentially dispositive and obviously central issue" in this case: whether the County employees were exempt from the FLSA. *See Wabol*, 958 F.2d at 1454. Moreover, deciding the merits will dispose of an unsettled issue of national significance. *See id.* at 1455. "Though the remaining [damages calculation] could eventually ascend to this court, this alone should not prevent our adjudication of important and potentially dispositive questions which have been fully briefed and argued." *Id.* Remanding would not promote judicial economy and would "therefore frustrate the very purpose of the final judgment rule." *Id.* Consequently, we have jurisdiction to consider this appeal.

III

Under the FLSA, employees must ordinarily be paid overtime compensation if they work more than forty hours in one week. 29 U.S.C. § 207(a)(1). However, the FLSA exempts from its overtime rule "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The County claims the employees who filed this case fall under this exemption.

"To fit within the overtime-exempt category for administrative or executive employees, an employee must meet both parts of a two-part test. The first part is a 'duties test.' The second part is a 'salary test.'" *Barner v. City of Novato*, 17 F.3d 1256, 1259-60 (9th Cir. 1994) (citations omitted). At issue in the instant case is the salary test promulgated by the Department of Labor ("DOL") in 1954. In essence, such a test provides that, to qualify as an executive, administrator, or professional subject to the exemption, an employee must be compensated on a genuine salary basis. *See* 29 C.F.R. § 541.118(a). Failure to satisfy the salary test alone ordinarily will result in the loss of the exemption.

See Abshire v. County of Kern, 908 F.2d 483, 484-85 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S. Ct. 785, 112 L. Ed. 2d 848 (1991). The district court concluded that the County did not satisfy the salary test and therefore could not claim the executive or administrative exemption.

"An employee is compensated on a salary basis only if his compensation is not subject to reduction based on the 'quality or quantity of the work performed.'"[1] *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994); *see* 29 C.F.R. § 541.118(a). Exemptions to the FLSA are to be narrowly construed, and the employer bears the burden of proof to show "the employees fit 'plainly and unmistakenly within [the exemption's] terms.'" *Abshire*, 908 F.2d at 485-86.

The County argues for the first time on appeal that the history of the salary test indicates that the version of that test in existence prior to its revision in 1991 and 1992 by the Department of Labor should not apply to public employees, a claim that has not yet been addressed by this circuit. We generally will not consider an argument for the first time on appeal, except if "the issue on appeal is purely one of law that is both central to the case and important to the public." *Yuckert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir. 1985), *rev'd on other grounds*, 482 U.S. 137, 107 S. CT 2287, 96 L. Ed. 2d 119 (1987). The D.C. Circuit refused to consider a similar issue for the first time on appeal in *Kinney v.*

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[1] 29 C.F.R. § 541.118(a) states:

An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

District of Columbia, 994 F.2d 6, 9-10 (D.C. Cir. 1993). However, because "consideration of the issue will not require the parties to develop new facts" and the validity of the regulation "presents a significant question of general impact," we will consider the argument. *See Yuckert*, 774 F.2d at 1367.

The County contends that the regulation adopting the relevant "salary test" is invalid because it is contrary to the FLSA and congressional intent. The Administrative Procedure Act ("APA") reflects the familiar principle that courts reviewing agency action will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the Supreme Court further defined this test. It stated that if Congress has directly spoken to a precise question and the intent of Congress is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Thus, we must first determine whether Congress directly addressed whether the salary test should apply to the public sector.

The DOL enacted the regulation that formulated the salary test twenty years before Congress amended the FLSA to apply to public employers. In 1974, Congress extended the FLSA's coverage to all public sector employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 59-63. Two years later, the Supreme Court held that the FLSA could not be applied to state and local government employees. *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). The Supreme Court overruled this holding in 1985. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528,

105, S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Congress then amended the FLSA in an effort to accommodate "the particular needs and circumstances of the States and their political subdivisions," S. Rep. No. 159, 99th Cong., 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655, but did not specifically address whether the salary test should apply to the public sector, *see* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787.

The legislative history of the 1974 amendments indicates that Congress intended the executive and administrative exception to apply to the public sector. It stated that "the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector." H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837 (emphasis added) [hereinafter House Report]. The 1974 amendment did not otherwise define "non-supervisory employees," so we assume Congress must have been referring to those not exempt under the executive and administrative exception. When Congress again amended the FLSA in 1985, it did not make reference to the executive and administrative exception. It therefore must have intended the executive and administrative exception to continue to apply to the public sector. Congress, however, was silent as to whether the 1954 salary test should apply to the public sector, so we must determine "whether the agency's answer is based on a permissible construction of the [FLSA]." *Chevron*, 467 U.S. at 843.

Unfortunately, the agency's "answer" has been entirely unclear. In 1987 the DOL realized that its 1954 salary test conflicted with numerous state and local statutory provisions prohibiting employees from being paid for time not actually worked, so it announced it would not enforce any aspect of the salary test with respect to public employers, pending revision of its regulations. *See* 57 Fed. Reg. 37,668 (1992). However, the DOL did not bar employees' claims against public employers. *See id.* ("This

nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA."). As a result, the issue continued to be debated in the courts. On September 6, 1991, the DOL passed an interim final regulation, suspending application of the salary test to public sector employees "paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-day." 56 Fed. Reg. 45,824 (1991). This permitted local governments to continue to use pay systems based on public accountability "without incurring liability for overtime pay under FLSA." 57 Fed. Reg. 37,670 (1992). On August 19, 1992, the DOL published its final regulation which states:

> An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability...

Id. at 37,677 (codified at 29 C.F.R. § 541.5d (1993)). It issued the final regulation because "certain aspects of the 'salary basis' test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector." *Id.* at 37,670.

At the time the County allegedly incurred liability, the DOL had not yet issued the 1991 regulation amending application of the salary test to the public sector. It had merely adopted its nonenforcement policy. Appellant argues the salary test, as it existed prior to September 6, 1991, is invalid as applied to the public sector because it was not reasonably related to the underlying purpose of the statute. *See American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 423, 103 S. Ct. 1921, 76

L. Ed. 2d 22 (1983) (to determine whether an agency complied with the APA, courts "need only conclude that [a regulation] is *a* reasonable interpretation of the relevant [statutory] provisions"); *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973). This argument has merit.

By making the FLSA applicable to the public sector, Congress intended the public sector to pay its employees overtime, but it also intended the executive and administrative exception to apply to the public sector. *See* House Report, *supra*. However, because virtually all public employers are constrained by pay systems based on public accountability,[2] most public employees could not satisfy the salary test as it existed prior to September 6, 1991.[3] And because such public employees failed

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[2] Public accountability is the notion that "governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for expenditure of public funds." *Hilbert v. District of Columbia*, 23 F.3d 429, 435 (D.C. Cir. 1994) (Henderson, J., concurring in part, dissenting in part) (quotation omitted).

[3] The district court erroneously held that the interim final regulation, which the DOL enacted on September 6, 1991, was invalid because the DOL did not adhere to the APA. The APA requires an agency to publish a notice of proposed rulemaking and accept comments 30 days before the rule's effective date, unless the agency has good cause not to do so. 5 U.S.C. § 553(d)(3). To avail itself of this exception, the agency must determine "'that compliance with the 30-day requirement is either impracticable, unnecessary or contrary to the public interest.'" *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982) (*quoting Kelly v. United States Dep't of the Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972)). The DOL explained that prior notice and comment were contrary to public interest because application of § 541.118 to public employees could result in "enormous, unforeseen liability of [State and local] governments and may threaten their fiscal integrity." 56 Fed. Reg. 45,825 (1991).

The district court rejected the DOL's decision to waive the notice and comment period because the DOL did not act in 1986, when § 541.118 first became applicable to the public sector, but waited until 1991 to enact the interim final rule. Yet the urgency to which the DOL was reacting did not arise until after 1987, when it became clear the federal courts were issuing conflicting

to satisfy the salary test, they could not qualify for the executive and administrative exemption. The significance of this is that the test deprived public entities of the white collar exemption created by Congress. Thus, the 1954 salary test clearly conflicted with congressional intent that public sector employers be able to claim the administrative and executive exception.[4]

The DOL's August 1992 regulation is evidence that the pre-1991-92 salary test is not reasonably related to the executive and administrative exemption, as applied to the public sector. In enacting the 1992 regulation, the DOL stated:

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decisions and local governments were therefore unable to predict whether they were complying with § 541.118. *See* 57 Fed. Reg. 37,669 nn.4-7 (1992); 56 Fed. Reg. 45,825 (1991)(stating that the September 1991 regulation was a response to "diverging judicial interpretations and accompanying confusion" which resulted in "the exposure of governmental employers to potentially enormous and generally unexpected" liability).

The "good cause" exception to the APA should be sparingly used in order to promote public input into agency rulemaking. *Buschmann*, 676 F.2d at 357. Nevertheless, by September 1991, the DOL was already reviewing public comments submitted in response to the DOL's advance notice of proposed rulemaking in 1985. *See* 56 Fed. Reg. 45,825 (1991). The public was not deprived of its input.

We have also stated that "the notice and comment procedures in Section 553 should be waived only when 'delay would do real harm.'" *Buschmann*, 676 F.2d at 357 (*quoting United States Steel Corp. v. United States Envtl. Protection Agency*, 595 F.2d 207, 214 (5th Cir.), *amended*, 598 F.2d 915 (5th Cir. 1979)). Such was the case here. Every day that the DOL delayed clarifying its regulation was another day that state and local governments might be exposed to unforeseen liability. This is just the type of emergency situation in which the "good cause" exception should apply.

[4] Although this Circuit has not previously considered this argument, some judges have found it convincing. *See, e.g., Hilbert*, 23 F.3d at 435 (Henderson, J., concurring in part, dissenting in part); *Stewart v. City & County of San Francisco*, 834 F. Supp. 1233, 1235-38 (N.D. Cal. 1993).

> [I]t is clear from a plain reading of FLSA's legislative history in 1974 ... that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended the FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

57 Fed. Reg. 37,672 (1992). The 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability.

The D.C. Circuit has suggested the DOL's "statements cannot be taken to mean ... that DOL declared its own regulation contrary to the statute and invalid *ab initio.*" *Kinney*, 994 F.2d at 10. We disagree. The DOL initially intended the 1992 amendment to the salary test to apply retroactively, *see* 57 Fed. Reg. 37,678, but the DOL withdrew the regulation because it concluded that such a change would have constituted invalid retroactive rulemaking under *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).[5] We believe the DOL's interest in applying the new salary test retroactively is indicative of its firm conviction that its earlier iteration of the

salary test conflicted with congressional intent. We share this conviction.

We therefore conclude that the salary test, 29 C.F.R. § 541.118, as it existed before the DOL suspended its application to public employers on September 6, 1991, was invalid in its entirety as it applied to the public sector. As the DOL said in 1992, the regulations were "out of harmony" with Congressional intent and inappropriate as applied to the public sector. Because the test's basic infirmity lies in its definition of what it means to be paid on a 'salary basis,' *see* 29 C.F.R. § 541.118(a), salvaging those contingent aspects of the regulation that qualify and provide exceptions to the initial definition, *see* 29 C.F.R. §§ 541.118(a)(1)-(6),(b),(c), is inappropriate. To do so would be tantamount to rulemaking, a power with which we are not invested.

Moreover, the nonenforcement policy covered the entire salary test, not just part of it; and essentially no valid salary test applicable to the public sector existed until the DOL finally conducted rulemaking in 1991 and 1992. Thus,through September 6, 1991, for public sector employees to qualify for the executive and administrative exception to the FLSA, they need only have satisfied the duties test.

Appellees argue that our decision to invalidate a portion of the salary test as applied to public employers is inconsistent with *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) *cert. denied*, 498 U.S. 1068, 111 S. Ct. 785, 112 L. Ed. 2d 848 (1991), "and innumerable other federal court decisions applying the test in the public sector." *Abshire* and the other cases to which appellees refer dealt with various questions relating to the proper

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[5] In *Bowen*, the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." 488 U.S. at 208, 109 S. Ct at 472.

interpretation of the salary test regulation. *See Barner v. City of Novato,* 17 F.3d 1256 (9th Cir. 1994); *Hurley v. Oregon,* 27 F.3d 392 (9th Cir. 1994). None of these cases considered or decided the validity of the regulation as applied to the public sector. They do not conflict in any way with our conclusion that application of a portion of the regulation to the public sector is contrary to the statute and therefore invalid.

We remand to the district court to determine whether plaintiffs were exempt from the FLSA under the duties test.

IV

1. Overtime Pay

Also at issue in this case is whether assistant deputy probation officers, nurses, and park rangers are entitled to overtime pay for standby time. The County says they are not. The district court disagreed with the County and granted summary judgment on this issue to the employees.

Resolution of these issues depends in turn on whether the employees were "engaged to wait," or whether they were "waiting to be engaged." *Skidmore v. Swift & Co.,* 323 U.S. 134, 137, 65 S. Ct. 161, 89 L. Ed. 124 (1944). In this respect, employees are "engaged to wait," or working, only if standby and night duty are "primarily for the benefit" of the County. *Armour & Co. v. Wantock,* 323 U.S. 126, 132, 65 S. Ct. 165, 89 L. Ed. 118 (1944). The factors to be determined in making this determination are:

> (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether the use of a pager could ease restric-

> tions; and (7) whether the employee had actually engaged in personal activities during call-in time...

and the agreement between the parties. *Owens v. Local No. 169*, 971 F.2d 347, 351, 354 (9th Cir. 1992) (footnotes omitted). No one factor is dispositive.

a. ADPOs

Undisputed evidence shows ADPOs are assigned to on-site back-up duty, during which they "stand by at the work site before or after [their] normal work period and [are] ready to return to work." Their Memorandum of Agreement (MOA) with the County indicates they are paid $18 for each such shift, and if called to active duty they are additionally paid the overtime rate (time and one-half). While on back-up, ADPOs must remain in camp unless they obtain prior permission of the supervisor on shift, and (not surprisingly) they cannot bring alcoholic beverages, nonprescription drugs or marijuana onto the premises. Some ADPOs reside permanently at the work sites while others do not.

ADPOs assigned to back-up duty can exchange shifts, are given sleeping quarters and shower facilities, and have access to weight-lifting equipment, a pool table, a satellite TV and a staff lounge. From 1988 through 1990, ADPOs were called back to work on 8, 5, and 10 occasions respectively. Appellant presents evidence that ADPOs consider these shifts a benefit.

This is a closer case than *Owens*. During the shift, there is an on-premises living requirement and strict geographical restrictions on employees' movements. However, the record shows the actual calls are infrequent, the on-call employee can trade on-call responsibilities, and employees do engage in personal activities. The employment agreement between the parties suggests they envisioned on-site night duty as work. Construing the evidence in the light most favorable to appellant, we affirm the district court's

grant of summary judgment in favor of the ADPOs who do not permanently reside at their work sites: their back-up duty was work; but reverse and remand as to the ADPOs who do permanently reside at such locations.

b. nurses

After working a shift, a nurse is appointed stand-by duty at a probation facility from 8:00 pm to 6:00 am. The nurses must remain at the facility, abide by rules governing staff at the facility, and keep their supervisor informed of their whereabouts. The nurses are paid for one hour at the regular rate, unless called to full duty, and they are provided sleeping, living, bath and kitchen facilities. However, the resolution of their status was decided on the basis of the invalid salary test. Therefore, we reverse the district court's summary judgment with respect to the nurses, and remand for further proceedings.

c. park rangers

The rangers work regular shifts, four or five days a week, and then are assigned to night duty, but they perform this duty in their own homes. During this time they cannot leave the park, must remain ready to respond to inquiries and enforce park rules, and abide by rules governing employee conduct. They are given two hours of pay, unless called to perform tasks beyond those normally associated with night duty. Of the seven rangers in this suit, five reside on County property. Because rangers are on stand-by at their residence, they most certainly engage in personal activities during the periods in dispute.

DOL regulations state that because it is difficult to determine the exact hours worked when an employee resides on his or her employer's premises, "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." 29 C.F.R. § 785.23. The district court held the regula-

tion was "not necessarily applicable where...there are restrictions upon the individuals' freedom," which suggests an employee is engaged in work if an employer places any restrictions on the employee. The flexibility of the test established by the Supreme Court suggests the district courts' approach was improper. *See Skidmore,* 323 U.S. at 137-40, 65 S. Ct. at 164-64. The record does not demonstrate that night duty time was so restricted that it could not be used for personal activities. Accordingly, on this issue we reverse the district court's summary judgment.

2. Statute of limitations and liquidated damages

As to the standby claims, the district court imposed a three year statute of limitations for a willful violation of the FLSA pursuant to 29 U.S.C. § 255(a), and awarded liquidated damages pursuant to 29 U.S.C. § 216(b). As we read the record, both determinations were mistaken. We are unable to identify any knowing or reckless conduct on behalf of the County in this regard. In fact, the County relied on substantial legal authority when it decided not to compensate for standing time as well as consulting experts and the DOL in an attempt to comply with the law. *See Cross v. Arkansas Forestry Comm'n,* 938 F.2d 912, 918 (8th Cir. 1991) (reliance on experts is a badge of good faith); *Hultgren v. County of Lancaster,* 913 F.2d 498, 506-510 (8th Cir. 1990)(the uncertainty about the application of the FLSA and consultation with counsel shed light on whether the employer had an honest intention to comply). Any conclusion that the County's behavior was deliberate or willful is clearly wrong, and we reverse with respect to the extended statute of limitations as well as the award of liquidated damages, the allotment of which constituted an abuse of discretion. *See McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988) (a violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.").

3. Exclusion of sleep and meal time

Appellants argue that if stand-by time is work time, then sleep time and meal periods should be excluded from the work period pursuant to 29 C.F.R. § 785.22 (1992). That regulation states that if "an employee is required to be on duty for 24 hours or more, the *employer and the employee may agree* to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period...." 29 C.F.R. § 785.22 (emphasis added). Appellant argues appellees implicitly agreed to exclude sleep and meal time in their MOAs. The regulation does not say such an agreement may be implied, and there is nothing in the MOAs to suggest time was deducted for meal periods or "regularly scheduled sleeping periods." Accordingly, meal and sleep time should not be deducted from the relevant work periods.

REVERSED and REMANDED.

SUPPLEMENTAL OPINION

The opinion in this case, *SEIU v. County of San Diego,* 35 F.3d 483 (9th Cir. 1994), is supplemented as follows:

PER CURIAM:

Predictably, the appellees in this case have filed a petition for rehearing and a suggestion for rehearing en banc from our invalidation of the Department of Labor's pre-September 6, 1991 version of the "salary test" as applied to the public sector in connection with overtime compensation.[1] Not so predictably, the Department of Labor ("DOL") has filed an amicus brief in support of the appellees' supplication. Stripped to its essentials, the DOL's position (in which the appellees have joined) is that we are required by *Chevron*[2] and its progeny to defer to the DOL's professed "interpretation" of the statutes it administers. The DOL claims its standard pre-1991 salary test relating to the white-collar exemption must control the outcome of this case. We respectfully disagree.

In an ordinary case, of course, the DOL would be correct regarding our obligation to defer. In this case, however, after conscientiously re-examining the entire record of the DOL's attention (or lack thereof) to the controlling issue, we conclude that the DOL's pre-September, 1991 "position" was not an engaged interpretation of the statute in the light of Congressional intent. Instead, between 1986 and 1991, the DOL simply defaulted on its mandate to interpret the Fair Labor Standards Act and to recast the relevant regulations in the light of a sea change caused by the

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[1] The appellants have filed a petition for rehearing to which we respond by amendments to our original opinion.

[2] *Chevron U.S.A., Inc. v. National Resources Defense Council,* 467 U.S. 837, 842-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

extension in 1985 and 1986 of the FLSA to nonfederal public employers. The DOL's inaction in this regard runs counter to *Chevron* itself which points out that "to engage in informed rule-making, [an agency] must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64; *see also Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 617, 64 S. Ct. 1215, 88 L. Ed. 1488 (1944)(Exemptions from the FLSA's controlling provisions relating to minimum wages or maximum hours are "part of a legislative code 'subject to continuous revision with the changing course of events.'") (*quoting U.S. v. Classic,* 313 U.S. 299, 316, 61 S. Ct. 1031 85 L. Ed. 1368, (1941)).

As briefly as possible, we shall explain why we see the DOL's "position" on this subject as a *lack* of an interpretation of the relevant statutes rather than an informed position to which we must defer.

The salary basis test—which is wholly a creation of the DOL— was designed in a context in 1940 that did not include governmental employees. Exemptions from Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers, *see* 57 Fed. Reg. 37,666 (1992). When the FLSA was extended to nonfederal public employees in 1985 and 1986 as a result of the Supreme Court's decision in *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S. Ct. 1005 83 L. Ed. 2d 1016, (1985), a new context was created, one which the DOL should have promptly addressed. The DOL admits it immediately recognized this responsibility and the need to accommodate in its regulations widespread public pay practices based on principles of public accountability of public employees. As the DOL said in an amicus brief[3] filed in 1993 in *Stewart, et al. v. City and County of San*

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[3] We take judicial notice of this document which is part of an official federal court record.

Francisco, et al., 834 F. Supp. 1233 (N.D. Cal. 1993), "When Congress passed the 1974 and the 1985 Amendments to the FLSA, it surely intended the section 13(a)(1) exemption to be available to public sector employers." Moreover, the DOL knew at least in 1986 that the existing salary basis test seriously interfered with the FLSA's white collar exemptions in the public sector. To quote from the DOL's historical record of these events,

> Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

57 Fed. Reg. 37,666-37,667 (1992).

Motivated by this mismatch between the regulations and the world of public employers, the DOL promised on January 16, 1987 to use rulemaking to address what it called an "anomaly." Virtually simultaneously, the DOL's Wage and Hour Administrator ("Administrator") issued on January 9, 1987 a revealing "enforcement" policy containing this language:

> It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment described in § 541.118 of 29 CFR Part 541....
>
> Revisions to the provisions of 29 CFR part 541, *including the salary tests,* have been under consideration as indicated in the Advance Notice of Proposed

> Rulemaking (ANPR) published in the Federal Register on November 19, 1985....
>
> While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees....

57 Fed. Reg. 37,666-37,668 (1992) (emphasis added). This nonenforcement policy is tantamount to an admission by the DOL that the regulation in place, i.e., the salary basis test, was unsuitable as applied to public employees.

Remarkably, however, the DOL accompanied its nonenforcement policy with an express statement by the Administrator that the policy was "not intended to affect any employee's rights [to file private lawsuits] under section 16(b) of the FLSA." *Id.* In effect, the DOL abdicated its central role in this evolving process and punted, sending the salary basis test and the overtime compensation issue to the courts.

Worse yet, the promised rulemaking did not immediately materialize. *Four years* passed with the nonenforcement policy in place and no definitive activity by the DOL to address this pressing problem. In the meanwhile, public employers and public employees found themselves in complex litigation trying to grapple with these pressing issues on which the DOL should have provided guidance, but did not.

The precipitating event that finally awakened the DOL (almost five years after *Garcia*) to its unmet responsibility was our decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S. Ct. 785, 112 L. Ed. 2d 848 (1991). In the tumultuous wake of *Abshire*, the DOL conceded that its nonenforcement policy and its deference to the courts, coupled with its own failure to act, had resulted in an open Pandora's box.

> The courts have interpreted the construction of the [salary test] regulations in different ways, reaching different results.
>
> ....
>
> Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments ... presented their urgent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.
>
> These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating....

57 Fed. Reg. 37,666-37,669 (1992).

The DOL has made another telling admission:

> With regard to the public sector, ... it is clear to the Department, after review of all the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees *did not serve their intended purpose when applied to the public sector,* as aspects of the "salary basis" requirement are *unduly restrictive* when applied in the public sector.

57 Fed. Reg. 37,666-37,670 (1992) (emphasis added). What the DOL meant by "unduly restrictive" is found in the same publication— we quoted it before, we'll quote it again:

> However, it is clear from a plain reading of FLSA's legislative history in 1974 (quoted in section II.B. above) that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments *simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute* because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

57 Fed. Reg. 37,672 (1992) (emphasis added). The DOL knew of this mismatch no later than January 16, 1987 when it promised rulemaking to rectify the predicament.

The DOL has admitted it defaulted on its responsibility promptly to update the regulations, and it did not make a real effort to do so until the courts (in its view) had confused the issue. Moreover, when the DOL finally got around to it in 1992, it confessed that the regulations to which it now says we should defer were not suitable for the public sector and "out of harmony" with the intent of the statute, a realization to which it should have responded with appropriate rulemaking in 1987 at the latest.

Under these circumstances, the DOL's request for deference to *an interpretation it never rendered*—an *interpretation which in any event would have been wrong*—is unusual, to say the least. With this unexemplary history in mind, the DOL—which has caused much of this sea of troubles—should not be surprised that we have determined its nonenforcement regulatory vacuum to have been arbitrary, capricious, and thus an abuse of discretion, entitled to no deference at all. *See Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782.

The peculiar circumstances of this case stand as an example of when *Chevron's* basic principle of deference does not control our decision. *See Vierra v. Rubin*, 915 F.2d 1372, 1376 (9th Cir. 1990) ("A court may invalidate an agency regulation...if legislative history reveals a clear expression of congressional intent that runs contrary to the regulation."); *cf. Thomas Jefferson Univ. v. Shalala*, ___U.S. ___, ___ 114 S. Ct. 2381, 2388, 129 L. Ed. 2d 405 (1994) ("[A]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981)); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1981)(Scalia, J., concurring in part and concurring in judgment) (explaining that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of construction courts normally employ").

In sum, we are asked to defer to the DOL's failure to discharge its responsibilities under the law and to apply in a pending lawsuit a regulation that is manifestly inappropriate. We decline this wondrous strange offer. As the Supreme Court said in *Chevron*, "The Judiciary is the final authority on issues of statutory construction which are contrary to clear congressional intent." 467 U.S. at 843,

n.9, 104 S. Ct. at 2782, n. 9 (citations omitted).

In reviewing this case, we have considered also the other arguments made by the appellees and the amici in connection with the petition for rehearing, and we do not find them persuasive.

As to certain arguments advanced by the appellants in their petition for rehearing, however, we have concluded they are correct. Our original opinion relating to the nurses, some of the ADPOs, the extended statute of limitations, and liquidated damages has been amended accordingly.

With the ordered amendments to the original opinion and this per curiam opinion, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

ORDER

The opinion filed October 10, 1994, slip op. 12181, and appearing at 35 F.3d 483 (9th Cir. 1994) is ordered amended as follows:

(1) Page 12190, line 3 of the second full paragraph; 35 F.3d at 487, line 4 of the third full paragraph, insert "numerous" between "with" and "state".

(2) Page 12190, line 5 of the same paragraph; 35 F.3d at 487, line 7 of the third full paragraph, insert "any aspect of" between "enforce" and "the".

(3) Page 12192, lines 3 and 4; 35 F.3d at 488, line 9 of the second full paragraph, insert "most" between "accountability," and "public".

(4) Page 12192, line 5; 35 F.3d at 488, line 11 of the second full paragraph, insert "such" between "because" and "public".

(5) Page 12193, line 1; 35 F.3d at 488, line 12 of the second full paragraph, replace "none" with "they", and insert "not" between "could" and "qualify".

(6) Page 12194, line 28; 35 F.3d at 489, line 2 of the third full paragraph, strike "(a)" after " § 541.118".

(7) Pages 12194, 12195; 35 F.3d at 489, third full paragraph, strike the sentence beginning "No part" on page 12194 and ending with "context." on page 12195, and strike the sentence beginning "It is not" and ending with "infirmity." on page 12195. In place of the stricken sentences, and immediately before the sentence beginning, "Thus, through September 6, 1991, ...", add the language: "As the DOL said in 1992, the regulations were "out of harmony" with Congressional intent and inappropriate as applied to the public sector. Because the test's basic infirmity lies in its definition of what it means to be paid on a 'salary basis,' *see* 29 C.F.R. § 541.118(a), salvaging those contingent aspects of the regulation that qualify and provide exceptions to the initial definition, *see* 29 C.F.R. §§ 541.118(a)(1)-(6),(b),(c), is inappropriate. To do so would be tantamount to rulemaking, a power with which we are not invested.

Moreover, the nonenforcement policy covered the entire salary test, not just part of it; and essentially no valid salary test applicable to the public sector existed until the DOL finally conducted rulemaking in 1991 and 1992.".

(8) Page 12196; 35 F.3d at 490, to the first paragraph under "a. ADPOs" (from which the apostrophe shall be

removed), add this sentence: "Some ADPOs reside permanently at the work sites while others do not.".

(9) Page 12197; 35 F.3d at 490, third full paragraph under "a. ADPOs", to the last line of the "a. ADPOs" discussion, insert: "who do not permanently reside at their work sites" between "ADPOs" and ":"; and change the final period to a semicolon and add: "but reverse and remand as to the ADPOs who do permanently reside at such locations.".

(10) Page 12197; 35 F.3d at 490, last sentence of the discussion entitled "b. nurses": strike the final sentence beginning with the word "Using" and ending with "work", and substitute: "However, the resolution of their status was decided on the basis of the invalid salary test. Therefore, we reverse the district court's summary judgment with respect to the nurses, and remand for further proceedings.".

(11) Page 12198; 35 F.3d at 491, add the following paragraph as new part "2.", and renumber the current "2. Exclusion of sleep and meal time" as "3.". Title of new part 2.: "Statute of limitations and liquidated damages". Text of new part 2.: "As to the standby claims, the district court imposed a three year statute of limitations for a willful violation of the FLSA pursuant to 29 U.S.C. § 255(a), and awarded liquidated damages pursuant to 29 U.S.C. § 216(b). As we read the record, both determinations were mistaken. We are unable to identify any knowing or reckless conduct on behalf of the County in this regard. In fact, the County relied on substantial legal authority when it decided not to compensate for standing time as well as consulting experts and the DOL in an attempt to comply with the law. *See Cross v. Arkansas Forestry Comm'n,*

938 F.2d 912, 918 (8th Cir. 1991) (reliance on experts is a badge of good faith); *Hultgren v. County of Lancaster,* 913 F.2d 498, 506-510 (8th Cir. 1990) (the uncertainty about the application of the FLSA and consultation with counsel shed light on whether the employer had an honest intention to comply). Any conclusion that the County's behavior was deliberate or willful is clearly wrong, and we reverse with respect to the extended statute of limitations as well as the award of liquidated damages, the allotment of which constituted an abuse of discretion. *See McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988) (a violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.").".

In addition to these amendments, and as part of this order, the panel responds to the petition for rehearing and the suggestion for rehearing en banc and supplements its opinion published at 35 F.3d 483 (9th Cir. 1994).

The full court was then advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56249

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; Probation Officers Association; Roslinda Arellanes; Teresa Ayala;
Renee U. Bonner, et al.,

Plaintiffs-Appellees,

v.

COUNTY OF SAN DIEGO,

Defendant-Appellant.

Argued, Submission Deferred November 5, 1993.

Resubmitted September 22, 1994.

Decided October 5, 1994.

Ian Fan, Deputy County Counsel, Miriam E. Brewster, Deputy County Counsel, San Diego, CA, for Ddefendant-Appellant.

Craig Becker, Service Employees Intern. Union, Los Angeles, CA, for Plaintiffs-Appellees.

Louise H. Renne, City Atty., Jonathan V. Holtzman, Special Asst. to City Atty., Arthur A. Hartinger, Deputy City Atty., San Francisco, CA, for Amicus.

Appeal from the United States District Court for the Southern District of California.

Before: BROWNING, BEEZER and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Employees of the County of San Diego sued the County of San Diego ("County"), claiming it failed to pay overtime compensation in accordance with the Fair Labor Standards Act ("FLSA"). 29 U.S.C. §§ 201-219. The district court issued three orders granting partial summary judgment for plaintiffs. *See Service Employees Int'l Union, Local 102 v. County of San Diego,* 784 F.Supp. 1503 (S.D.Cal.1992). The court held that plaintiffs were not exempt from FLSA coverage and that, as a matter of law, plaintiffs were entitled to overtime compensation for on-site back-up duty. The County appeals, arguing the FLSA exemption should have precluded liability and that the employees' on-site stand-by time was not "work" as a matter of law.

We hold that the version of the "salary test" in existence prior to September 6, 1991 was invalid in its entirety as applied to the public sector. Thus, we reverse and remand to the district court for further proceedings consistent with this opinion.

I

County assistant deputy probation officers ("ADPOs"), nurses, and park rangers filed this suit against the County, claiming the County violated the FLSA by failing to pay them overtime for "on-site back-up duty," or "stand-by," time. The County defended by claiming plaintiffs were exempt from FLSA coverage.

The district court issued three orders granting partial summary judgment. On April 23, 1991, the court granted partial summary judgment for plaintiffs on their claim that ADPOs were eligible for overtime during their on-site back-up time. On February 11, 1992, the district court granted partial summary judgment concluding: 1) the three year statute of limitations applied because the County's violations were wilful; 2) the employees were entitled to liquidated damages; and 3) the County improperly exempted the ADPOs as salaried employees. On August 5, 1992, the court granted partial summary judgment, concluding: 1) liquidated damages and the three year statute of limitations should also apply to the nurses and park rangers; and 2) the court's holding in the April 1991 order should apply to nurses and park rangers.

II

The piecemeal nature in which this case was decided creates a jurisdictional question: whether the district court decision is final for purposes of 28 U.S.C. § 1291. "Under the final judgment rule embodied in 28 U.S.C. § 1291, parties may appeal only the final decisions of the district courts. A final judgment ... is a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir.1994) (quotation omitted). Partial summary judgment is not an inherently final order, *id.; Cheng v. Commissioner,* 878 F.2d 306, 309 (9th Cir. 1989), and the orders in the instant case are not final because the district court has not yet calculated damages.

The Supreme Court has held that the requirement of finality is to be given a practical construction. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S.Ct. 308, 311-12, 13 L.Ed.2d 199 (1964). In *In re Subpoena Served on the California Public Utilities Commission*, 813 F.2d 1473, 1479-80 (9th Cir.1987), however, we observed that the "exercise of appellate jurisdiction in Gillespie was based upon the unique circumstances of the case" and noted that the decision should be applied "only sparingly." To satisfy the practical finality rule, the following factors must be satisfied:

> (1) the [decision appealed] was a "marginally final order," (2) [which] "disposed of an unsettled issue of national significance," (3) review "implemented the same policy Congress sought to promote in s 1292(b)," and (4) the finality issue was not presented to the [appellate court] until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue.

Id. at 1480 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30, 98 S.Ct. 2454, 2462 n. 30, 57 L.Ed.2d 351 (1978)); *accord Wabol v. Villacrusis*, 958 F.2d 1450, 1454 (9th Cir.1990), *cert. denied*, — U.S. ——, 113 S.Ct. 675, 121 L.Ed.2d 598 (1992).

The challenged orders are "marginally final" because the calculation of damages "will not affect the potentially dispositive and obviously central issue" in this case: whether the County employees were exempt from the FLSA. *See Wabol*, 958 F.2d at 1454. Moreover, deciding the merits will dispose of an unsettled issue of national significance. *See id.* at 1455. "Though the remaining [damages calculation] could eventually ascend to this court, this alone should not prevent our adjudication of important and potentially dispositive questions which have been fully

briefed and argued." *Id.* Remanding would not promote judicial economy and would "therefore frustrate the very purpose of the final judgment rule." *Id.* Consequently, we have jurisdiction to consider this appeal.

III

Under the FLSA, employees must ordinarily be paid overtime compensation if they work more than forty hours in one week. 29 U.S.C. § 207(a)(1). However, the FLSA exempts from its overtime rule "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The County claims the employees who filed this case fall under this exemption.

"To fit within the overtime-exempt category for administrative or executive employees, an employee must meet both parts of a two-part test. The first part is a 'duties test.' The second part is a 'salary test.' " *Barner v. City of Novato,* 17 F.3d 1256, 1259-60 (9th Cir.1994) (citations omitted). At issue in the instant case is the salary test promulgated by the Department of Labor ("DOL") in 1954. In essence, such a test provides that, to qualify as an executive, administrator, or professional subject to the exemption, an employee must be compensated on a genuine salary basis. *See* 29 C.F.R. § 541.118(a). Failure to satisfy the salary test alone ordinarily will result in the loss of the exemption. *See Abshire v. County of Kern,* 908 F.2d 483, 484-85 (9th Cir.1990), *cert. denied,* 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). The district court concluded that the County did not satisfy the salary test and therefore could not claim the executive or administrative exemption.

> "An employee is compensated on a salary basis only if his compensation is not subject to reduction based on the 'quality or quantity of the work performed.' " [1] *Hurley v. Oregon,* 27 F.3d 392, 394 (9th Cir.1994); *see* 29 C.F.R. §

541.118(a). Exemptions to the FLSA are to be narrowly construed, and the employer bears the burden of proof to show "the employees fit 'plainly and unmistakenly within [the exemption's] terms.'" *Abshire*, 908 F.2d at 485-86.

The County argues for the first time on appeal that the history of the salary test indicates that the version of that test in existence prior to its revision in 1991 and 1992 by the Department of Labor should not apply to public employees, a claim that has not yet been addressed by this circuit. We generally will not consider an argument for the first time on appeal, except if "the issue on appeal is purely one of law that is both central to the case and important to the public." *Yuckert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir.1985), *rev'd on other grounds*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The D.C. Circuit refused to consider a similar issue for the first time on appeal in *Kinney v. District of Columbia*, 994 F.2d 6, 9-10 (D.C.Cir.1993). However, because "consideration of the issue will not require the parties to develop new facts" and the validity of the regulation "presents a significant question of general impact," we will consider the argument. *See Yuckert*, 774 F.2d at 1367.

The County contends that the regulation adopting the relevant "salary test" is invalid because it is contrary to the FLSA and congressional intent. The Administrative Procedure Act ("APA") reflects the familiar principle that courts reviewing agency action

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[1] 29 C.F.R. § 541.118(a) states:

An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984), the Supreme Court further defined this test. It stated that if Congress has directly spoken to a precise question and the intent of Congress is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2781. Thus, we must first determine whether Congress directly addressed whether the salary test should apply to the public sector.

The DOL enacted the regulation that formulated the salary test twenty years before Congress amended the FLSA to apply to public employers. In 1974, Congress extended the FLSA's coverage to all public sector employees. Fair Labor Standards Amendments of 1974, Pub.L. No. 93-259, § 6, 88 Stat. 55, 59- 63. Two years later, the Supreme Court held that the FLSA could not be applied to state and local government employees. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). The Supreme Court overruled this holding in 1985. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Congress then amended the FLSA in an effort to accommodate "the particular needs and circumstances of the States and their political subdivisions," S.Rep. No. 159, 99th Cong., 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655, but did not specifically address whether the salary test should apply to the public sector, *see* Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787.

The legislative history of the 1974 amendments indicates that Congress intended the executive and administrative exception to apply to the public sector. It stated that "the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector." H.R.Rep. No. 913, 93d Cong., 2d Sess. (1974), *reprinted* in 1974 U.S.C.C.A.N. 2811, 2837 (emphasis added) [hereinafter House Report]. The 1974 amendment did not otherwise define "non-supervisory employees," so we assume Congress must have been referring to those not exempt under the executive and administrative exception. When Congress again amended the FLSA in 1985, it did not make reference to the executive and administrative exception. It therefore must have intended the executive and administrative exception to continue to apply to the public sector. Congress, however, was silent as to whether the 1954 salary test should apply to the public sector, so we must determine "whether the agency's answer is based on a permissible construction of the [FLSA]." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Unfortunately, the agency's "answer" has been entirely unclear. In 1987 the DOL realized that its 1954 salary test conflicted with state and local statutory provisions prohibiting employees from being paid for time not actually worked, so it announced it would not enforce the salary test with respect to public employers, pending revision of its regulations. *See* 57 Fed.Reg. 37,668 (1992). However, the DOL did not bar employees' claims against public employers. *See id.* ("This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA."). As a result, the issue continued to be debated in the courts. On September 6, 1991, the DOL passed an interim final regulation, suspending application of the salary test to public sector employees "paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-

day." 56 Fed.Reg. 45,824 (1991). This permitted local governments to continue to use pay systems based on public accountability "without incurring liability for overtime pay under FLSA." 57 Fed.Reg. 37,670 (1992). On August 19, 1992, the DOL published its final regulation which states:

> An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability....

Id. at 37,677 (codified at 29 C.F.R. § 541.5d (1993)). It issued the final regulation because "certain aspects of the 'salary basis' test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector." *Id.* at 37,670.

At the time the County allegedly incurred liability, the DOL had not yet issued the 1991 regulation amending application of the salary test to the public sector. It had merely adopted its nonenforcement policy. Appellant argues the salary test, as it existed prior to September 6, 1991, is invalid as applied to the public sector because it was not reasonably related to the underlying purpose of the statute. *See American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 423, 103 S.Ct. 1921, 1933, 76 L.Ed.2d 22 (1983) (to determine whether an agency complied with the APA, courts "need only conclude that [a regulation] is *a* reasonable interpretation of the relevant [statutory] provisions"); *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973). This argument has merit.

By making the FLSA applicable to the public sector, Congress intended the public sector to pay its employees overtime, but it also intended the executive and administrative exception to apply to the public sector. *See* House Report, *supra.* However, because virtually all public employers are constrained by pay systems based on public accountability, [2] public employees could not satisfy the salary test as it existed prior to September 6, 1991. [3] And because public employees failed to satisfy the salary test, none could qualify for the executive and administrative exemption. The significance of this is that the test deprived public entities of the white collar exemption created by Congress.

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[2] Public accountability is the notion that "governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for expenditure of public funds." *Hilbert v. District of Columbia,* 23 F.3d 429, 435 (D.C.Cir.1994) (Henderson, J., concurring in part, dissenting in part) (quotation omitted).

[3] The district court erroneously held that the interim final regulation, which the DOL enacted on September 6, 1991, was invalid because the DOL did not adhere to the APA. The APA requires an agency to publish a notice of proposed rulemaking and accept comments 30 days before the rule's effective date, unless the agency has good cause not to do so. 5 U.S.C. § 553(d)(3). To avail itself of this exception, the agency must determine " 'that compliance with the 30-day requirement is either impracticable, unnecessary or contrary to the public interest,' " *Buschmann v. Schweiker,* 676 F.2d 352, 356 (9th Cir.1982) (quoting *Kelly v. United States Dep't of the Interior,* 339 F.Supp. 1095, 1101 (E.D.Cal.1972)). The DOL explained that prior notice and comment were contrary to public interest because application of § 541.118 to public employees could result in "enormous, unforeseen liability of [State and local] governments and may threaten their fiscal integrity." 56 Fed.Reg. 45,825 (1991).

The district court rejected the DOL's decision to waive the notice and comment period because the DOL did not act in 1986, when § 541.118 first became applicable to the public sector, but waited until 1991 to enact the interim final rule. Yet the urgency to which the DOL was reacting did not arise until after 1987, when it became clear the federal courts were issuing conflicting decisions and local governments were therefore unable to predict whether they

Thus, the 1954 salary test clearly conflicted with congressional intent that public sector employers be able to claim the administrative and executive exception. [4]

The DOL's August 1992 regulation is evidence that the pre-1991-92 salary test is not reasonably related to the executive and administrative exemption, as applied to the public sector. In enacting the 1992 regulation, the DOL stated:

> [I]t is clear from a plain reading of FLSA's legislative history in 1974 ... that Congress intended for the section 13(a)(1) exemption to be available for pubic sector employees. Congress presumably was unaware that, because many public sector compensation systems pre-

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were complying with § 541.118. *See* 57 Fed.Reg. 37,669 nn. 4-7 (1992); 56 Fed.Reg. 45,825 (1991) (stating that the September 1991 regulation was a response to "diverging judicial interpretations and accompanying confusion" which resulted in "the exposure of governmental employers to potentially enormous and generally unexpected" liability).

The "good cause" exception to the APA should be sparingly used in order to promote public input into agency rulemaking. *Buschmann*, 676 F.2d at 357. Nevertheless, by September 1991, the DOL was already reviewing public comments submitted in esponse to the DOL's advance notice of proposed rulemaking in 1985. *See* 56 Fed.Reg. 45,825 (1991). The public was not deprived of its input.

We have also stated that "[t]he notice and comment procedures in Section 553 should be waived only when 'delay would do real harm.'" *Buschmann*, 676 F.2d at 357 (quoting *United States Steel Corp. v. United States Envtl. Protection Agency*, 595 F.2d 207, 214 (5th Cir.), *amended*, 598 F.2d 915 (5th Cir.1979)). Such was the case here. Every day that the DOL delayed clarifying its regulation was another day that state and local governments might be exposed to unforeseen liability. This is just the type of emergency situation in which the "good cause" exception should apply.

[4] Although this Circuit has not previously considered this argument, some judges have found it convincing. *See, e.g., Hilbert*, 23 F.3d at 435 (Henderson, J., concurring in part, dissenting in part); *Stewart v. City & County of San Francisco*, 834 F.Supp. 1233, 1235-38 (N.D.Cal.1993).

> clude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended the FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

57 Fed.Reg. 37,672 (1992). The 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability.

The D.C. Circuit has suggested the DOL's "statements cannot be taken to mean ... that DOL declared its own regulation contrary to the statute and invalid *ab initio.*" *Kinney*, 994 F.2d at 10. We disagree. The DOL initially intended the 1992 amendment to the salary test to apply retroactively, see 57 Fed.Reg. 37,678, but the DOL withdrew the regulation because it concluded that such a change would have constituted invalid retroactive rulemaking under *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988).[5] We believe the DOL's interest in applying the new salary test retroactively is indicative of its firm conviction that its earlier iteration of the

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[5] In *Bowen*, the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." 488 U.S. at 208, 109 S.Ct. at 472.

salary test conflicted with congressional intent. We share this conviction.

We therefore conclude that the salary test, 29 C.F.R. § 541.118(a), as it existed before the DOL suspended its application to public employers on September 6, 1991, was invalid in its entirety as it applied to the public sector. No part of that test remains valid in this context. It is not possible to salvage parts of it given its basic infirmity. Thus, through September 6, 1991, for public sector employees to qualify for the executive and administrative exception to the FLSA, they need only have satisfied the duties test.

Appellees argue that our decision to invalidate a portion of the salary test as applied to public employers is inconsistent with *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir.1990) *cert. denied*, 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991), "and innumerable other federal court decisions applying the test in the public sector." *Abshire* and the other cases to which appellees refer dealt with various questions relating to the proper interpretation of the salary test regulation. *See Barner v. City of Novato*, 17 F.3d 1256 (9th Cir.1994); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir.1994). None of these cases considered or decided the validity of the regulation as applied to the public sector. They do not conflict in any way with our conclusion that application of a portion of the regulation to the public sector is contrary to the statute and therefore invalid.

We remand to the district court to determine whether plaintiffs were exempt from the FLSA under the duties test.

IV

1. *Overtime Pay*

Also at issue in this case is whether assistant deputy probation officers, nurses, and park rangers are entitled to overtime pay for

standby time. The County says they are not. The district court disagreed with the County and granted summary judgment on this issue to the employees.

Resolution of these issues depends in turn on whether the employees were "engaged to wait," or whether they were "waiting to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S.Ct. 161, 163, 89 L.Ed. 124 (1944). In this respect, employees are "engaged to wait," or working, only if standby and night duty are "primarily for the benefit" of the County. *Armour & Co. v. Wantock*, 323 U.S. 126, 132, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944). The factors to be determined in making this determination are:

> (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether the use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time....

and the agreement between the parties. *Owens v. Local No. 169*, 971 F.2d 347, 351, 354 (9th Cir.1992) (footnotes omitted). No one factor is dispositive.

a. ADPO's

Undisputed evidence shows ADPOs are assigned to on-site back-up duty, during which they "stand by at the work site before or after [their] normal work period and [are] ready to return to work." Their Memorandum of Agreement (MOA) with the County indicates they are paid $18 for each such shift, and if called to active duty they are additionally paid the overtime rate

(time and one-half). While on back-up, ADPOs must remain in camp unless they obtain prior permission of the supervisor on shift, and (not surprisingly) they cannot bring alcoholic beverages, nonprescription drugs or marijuana onto the premises.

ADPOs assigned to back-up duty can exchange shifts, are given sleeping quarters and shower facilities, and have access to weight-lifting equipment, a pool table, a satellite TV and a staff lounge. From 1988 through 1990, ADPOs were called back to work on 8, 5, and 10 occasions respectively. Appellant presents evidence that ADPOs consider these shifts a benefit.

This is a closer case than *Owens*. During the shift, there is an on-premises living requirement and strict geographical restrictions on employees' movements. However, the record shows the actual calls are infrequent, the on-call employee can trade on-call responsibilities, and employees do engage in personal activities. The employment agreement between the parties suggests they envisioned on-site night duty as work. Construing the evidence in the light most favorable to appellant, we affirm the district court's grant of summary judgment in favor of the ADPOs: their back-up duty was work.

b. nurses

After working a shift, a nurse is appointed stand-by duty at a probation facility from 8:00 pm to 6:00 am. The nurses must remain at the facility, abide by rules governing staff at the facility, and keep their supervisor informed of their whereabouts. The nurses are paid for one hour at the regular rate, unless called to full duty, and they are provided sleeping, living, bath and kitchen facilities. Using the relevant test, we affirm the district court's summary judgment in favor of the nurses: their stand-by duty was work.

c. park rangers

The rangers work regular shifts, four or five days a week, and then are assigned to night duty, but they perform this duty in their own homes. During this time they cannot leave the park, must remain ready to respond to inquiries and enforce park rules, and abide by rules governing employee conduct. They are given two hours of pay, unless called to perform tasks beyond those normally associated with night duty. Of the seven rangers in this suit, five reside on County property. Because rangers are on stand-by at their residence, they most certainly engage in personal activities during the periods in dispute.

DOL regulations state that because it is difficult to determine the exact hours worked when an employee resides on his or her employer's premises, "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." 29 C.F.R. § 785.23. The district court held the regulation was "not necessarily applicable where ... there are restrictions upon the individuals' freedom," which suggests an employee is engaged in work if an employer places any restrictions on the employee. The flexibility of the test established by the Supreme Court suggests the district courts' approach was improper. *See Skidmore,* 323 U.S. at 137-40, 65 S.Ct. at 163-64. The record does not demonstrate that night duty time was so restricted that it could not be used for personal activities. Accordingly, on this issue we reverse the district court's summary judgment.

2. Exclusion of sleep and meal time

Appellants argue that if stand-by time is work time, then sleep time and meal periods should be excluded from the work period pursuant to 29 C.F.R. § 785.22 (1992). That regulation states that if "an employee is required to be on duty for 24 hours or more, the *employer and the employee may agree* to exclude bona fide meal periods and a bona fide regularly scheduled sleeping peri-

od...." 29 C.F.R. § 785.22 (emphasis added). Appellant argues appellees implicitly agreed to exclude sleep and meal time in their MOAs. The regulation does not say such an agreement may be implied, and there is nothing in the MOAs to suggest time was deducted for meal periods or "regularly scheduled sleeping periods." Accordingly, meal and sleep time should not be deducted from the relevant work periods.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

D.C. No. CV-90-1211-GT-M

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; et al.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO,

Defendant

Filed August 5, 1992

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for summary judgment came for hearing before the Court on July 27, 1992 at 10:30 a.m. The Court has fully considered this matter, including review of the papers filed by the parties, the authorities cited therein, and the arguments presented.

BACKGROUND

This case returns for a final summary judgment motion. Previous partial summary judgment orders were entered in this case in April 1991 and February 1992, and an order was entered in the related case of *Adam v. County*, 90-1081-GT, in June 1992. The following issues are before the court: (1) what is the statute of limitations for the non-Assistant Deputy Probation Officers (non-ADPOS); (2) are non-ADPOS entitled to liquidated damages or interest; (3) does the court's earlier holding apply to on-site stand-by nurses; and (4) does the court's earlier holding apply to on-site night duty rangers.

CONCLUSIONS OF LAW

(1) What is the statute of limitations for the non-Assistant Deputy Probation Officers (non- ADPOS)

An action under FLSA must be brought within two years except "a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). The issue here is whether the two year or the three year statute of limitations applies—was this a willful violation.

A. The Court's Statements in ADAMS Regarding the Two Year Statute of Limitations is not Binding in this Litigation

In *Adams*, the Court ruled that plaintiffs would receive damages based on a two year statute of limitations. The County argues that this ruling is dispositive of how this issue should be resolved, reasoning that collateral estoppel principles were used against the County in *Adams*, and thus collateral estoppel principles should be used in this motion as well. The County's argument fails for two reasons: first, the plaintiffs in *Adams* did not request the three year statute of limitations—they requested damages for two years, which was granted (the Court did not address the applicability of the three year statute in *Adams*, and thus there is no holding which could have a preclusive effect); and second, even if the court had ruled on the issue, the County would not be entitled to use the ruling in *Adams* in an adverse manner against the plaintiffs in this litigation because the plaintiffs were not a party to the *Adams* litigation. The County is a party in both actions and can have matters decided against it in one proceeding decided against it in another—non-party plaintiffs stand in an entirely different light. As a result, it is necessary to resolve this issue of whether these plaintiffs are entitled to use the three year statute of limitations.

B. The Evidence Warrants Imposition of the Three Year Statute of Limitations Because the County's Conduct was Willful

A violation is willful only where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The County submitted evidence to demonstrate the efforts it undertook to determine whether its employees were salaried within the meaning of FLSA. The County met with Department of Labor officials on various occasions, and received oral approval for some of the positions of their plan. Formal approval of all portions of the County's plan was never received. In the meantime, the Department of Labor adopted a non-enforcement policy concerning the salary test. After

receiving word of this change in policy, the County stopped all plans to alter its employment plan. Importantly, however, the non-enforcement policy only applied to the Department of Labor's actions, but *did not affect any employees' rights in private actions.* The County knew that the non- enforcement plan did not affect the application of this rule in private actions, but dropped its plan to review the plan anyway.

Then in 1990, the Ninth Circuit decided in *Abshire v. County of Kern,* 908 F.2d 483 (9th Cir. 1990), which clearly set forth that the County's interpretation on this issue was incorrect. The County, however, took no action immediately following this ruling (which was binding immediately in this district), and did not begin to re-examine its plan until 45 days after the Supreme Court denied certiorari, almost a full year after the Ninth Circuit had ruled. It was only at this time that the County stopped docking for absences of less than a day. The County, however, continued to dock leave, but not pay, despite warnings in *Abshire* that such a policy also would violate FLSA. The County's unwillingness to accept what it was being told by the ninth circuit is best summarized in the following statement during the deposition of Patrick Mahler, the private consultant in charge of reviewing the plan: "So did I think it was a problem for the County? No. I thought it was a problem with the Court."

Despite the fact that it never actually received formal written approval of all aspects from the Department of Labor, the County dropped its review plans based on the non-enforcement policy, even though this policy had no affect on private suits. Then, the County continued to disregard indications from the Ninth Circuit that its plans were not in compliance. Although the County did make some initial efforts to review its plan, its conduct, especially in the latter stages, showed a reckless disregard for the matter of whether it's [sic] conduct was prohibited by the statute. As a result, under *McLaughlin,* the violation is willful, and the plain-

tiffs are entitled to damages for a period a [sic] three-years prior to the filing of the lawsuit.

(2) Are non-ADPOS entitled to liquidated damages or interest

FLSA provides that an employer who violates the minimum wage or maximum hour provisions "shall be liable for ... the payment of wages lost and an equal amount as liquidated damages." 29 U.S.C. § 216(b). Liquidated damages are not penal in nature, but instead "constitute[] compensation for the retention of a workman's pay which might result in damages too obscure and difficult or proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945). Importantly, in a FLSA case, "Double damages are the norm, single damages the exception." *Watson v. United Consumers Club, Inc.,* 786 F.2d 303, 310 (7th Cir. 1986).

Although FLSA makes the award of liquidated damages mandatory, it created an exception where the court had discretion not to award liquidated damages "if the employer shows...that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." 29 U.S.C. § 260. To benefit from this exception, the employer must pass both a subjective and an objective test. *See,* 29 C.F.R. § 790.22(b) (1) The employers must show ... that the act or omission giving rise to such action was in good faith; and (2) he must show also ... that he had reasonable ground for believing that his act or omission was not a violation of the ... Act.")

As the facts and discussion in the preceding section indicate, the County's conduct does not pass the willful test. As a result, liquidated damages should be awarded. Moreover, even if the County could pass these testes, it would still be within the Court's discretion, given the normalcy of liquidated damages in FLSA actions, to award liquidated damages. Although the Court does

not reach this issue, even if the County's conduct passed the objective and subjective tests, the County's conduct is not deserving of relief from the normal rule — liquidated damages.

(3) Does the court's earlier holding apply to on-site stand-by nurses

As the County correctly acknowledges, the court intends to follow its earlier rulings. Based on the prior rulings against the County by this Court, and based on the fact that the County has provided no evidentiary basis for distinguishing factually the nurses from the ADPOS, the Court's earlier holding must apply to on-site stand-by nurses.

Specifically, the four nurses (Irene Clayton, Nancy Reinhardt, Connie Sevilla, and Milton Thornton) work a normal shift from 6:30 a.m. to 8:30 p.m. One of them is then required to remain on-site stand-by duty from 8:30 p.m. to 6:00 a.m. While on stand-by duty, a nurse cannot leave the facility, must abide by all rules governing staff at the facility, must keep each dorm and the duty supervisor informed of his or her whereabouts at all times, and must remain ready to return to work at any time. The County pays the nurses for one-hour at their normal rate for the entire nine and one-half hour stand-by shift unless they are called to active duty. These factors mirror the facts behind the court's April 1991 order and have been distinguished. As a result, the nurses are entitled to coverage under FLSA, including the three years statute of limitations and the liquidated damages.

(4) Does the court's earlier holding apply to on-site night duty rangers

Unlike the situation with the nurses, the County does attempt to factually distinguish the on-sight night duty rangers. The County notes that the key factual distinction is that the rangers *reside permanently at their work sites.* In drawing this distinction,

the County recognizes that the fact that employees are kept away from home is one of the reasons driving the FLSA coverage in cases such as these, and indeed this was a significant factor in this court's April 1991 order.

The Department of Labor regulations provide:

> An employee who resides on his employer's premises on a permanent basis or for any extended periods of time *is not considered as working all the time he is on the premises.* Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the plumber of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switch board in her own home. *Skelly Oil v. Jackson,* 194 Ok. 183 (Sup. Ct. 1944); *Thompson v. Loring Oil Co.,* 50 F.Supp. 213 (W.D. La. 1943).

29 C.F.R. § 785.23. The County argues that pursuant to this regulation, night duty does not constitute "work" for which hourly compensation is required. This regulation, however, is not necessarily applicable where, as is the case here, there are restrictions upon the individuals [sic] freedom. Specifically, while there are times when rangers have complete freedom from all duties, rangers did not have such freedom when they are on the night shift. Indeed, in reviewing the April 1991 order, the opinion was primarily based on the deprivations placed on the *employees' freedoms.* Obviously not being able to go home is a significant depri-

vation of freedom, but even if one is at home, there might still be a sufficient deprivation to qualify as work in some factual settings. Here, there were significant restrictions on the rangers when they were on the night shift. They work a normal shift of either eight or ten hours, after which they are often required to work an on-site night shift for the remainder of the 24 hour day. When the rangers work this "night shift," they cannot leave the camp, they must obey all rules governing employees on day duty in the camp (including the rule prohibiting the consumption of alcohol), they must remain accessible to members of the public using the camps, and they must remain ready at all times to respond to the public inquiries, enforce park rules and insure public safety in the camps. Importantly, several routine duties, such as assisting members of the public using the camps, enforcing camp rules, and maintaining public safety in the camps, are not considered active duty, but instead are merely considered normal night shift duties. Although rangers reside normally at the work sites, this does not overcome the other deprivations of their freedom that the "night shift" imposes upon them. Unlike the situation the County attempts to rely on in *Rural Fire Protection Co. v. Hepp*, 366 F.2d 255, 361 (9th Cir. 1966), the rangers are not merely sleeping in their residences, but they additionally have duties and responsibilities as well. As a result, the rangers are entitled to coverage under FLSA, including the three year statute of limitations and the liquidated damages.

CONCLUSION

IT IS HEREBY ORDERED that:

(1) plaintiffs' motion that non-Assistant Deputy Probation Officers are entitled to use the three year statute of limitations is GRANTED.

(2) plaintiffs' motion that Non-Assistant Deputy Probation Officers be awarded liquidated damages is GRANTED.

(3) plaintiffs' motion that on-site stand-by nurses and on-site night duty rangers prevail under FLSA is GRANTED based on the County's inability to distinguish these plaintiffs from the Non-ADPOS. As a result, the three year statute of limitations governs, and these plaintiffs are entitled to liquidated damages.

IT IS SO ORDERED.

Dated: August 1, 1992

GORDON THOMPSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
S.D. CALIFORNIA

No. 90-1211-GT-M

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; et al.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO,

Defendant

Feb. 11, 1992.

Craig Becker, UCLA Law School, Los Angeles, Cal., Robert A. Bush, Jesus E. Quinonez, Hope J. Singer, Taylor, Roth, Bush & Geffner, Burbank, Cal., for Plaintiffs.

Lloyd M. Harmon, Jr., County Counsel, Diane Bardsley, Chief Deputy, Ian Fan, Deputy, Miriam Milich, Deputy, San Diego, Cal., for Defendant.

ORDER ON PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

GORDON THOMPSON, Jr., District Judge.

Following briefing of these issues by the parties, these motions for partial summary judgment came on for hearing before the Court on February 10, 1992 at 10:30 a.m. The Court has fully considered this matter, including review of the papers filed by the parties, the authorities cited therein, and the arguments presented.

I

INTRODUCTION

Plaintiffs' motions for partial summary judgment were presented to the Court on three issues:

(1) Whether the employer's violation was willful, thus entitling plaintiffs to damages for the three years prior to the filing of the complaint, instead of only for the two years clearly authorized by the Fair Labor Standards Act ("FLSA" or the "Act").

(2) Whether the employer's violation was willful, thus entitling plaintiffs to liquidated damages.

(3) Whether plaintiffs are non-salaried employees, and thus not exempt from bringing an action under FLSA.

Additional issues as well were addressed in the moving papers. This opinion will address these motions in two sections, (1) Damages and (2) Exemption from FLSA.

II

DAMAGES

A. FACTUAL BACKGROUND

Following a complaint filed with the Department of Labor's (DOL's) Wage and Hour Division concerning lack of compensation for on-site back-up duty, the DOL assigned Compliance

Officer Dean Smith to meet with various County of San Diego officials. Following his investigation, on July 10, 1987, Smith informed County Labor Relations Specialist Dan Kelley that on-site back-up duty "appears to be hours worked." He explained that the back-up duty was "[h]ours worked because of the restriction on time."

Then, on August 4, 1987, Smith participated in a conference call with Kelley; Merrilyn Carpenter, the Department of Probation's Personnel and Training Administrator; and Pat Mahler, a personnel consultant for the County. During this call, Smith informed these County agents that the work in question was "worktime."

On September 3, 1987, Smith told Kelley that the County should "recompute hours and give back-pay." The next day, Smith stated that "he could put things in writing stating that stand-by should be counted as hours worked," but County officials "discouraged a written letter at [that] time."

In another meeting on September 15, 1987, Kelley took notes, with an asterisk for emphasis, which stated: "Position of DOL is if its on site, some of the time has to be counted hours worked notwithstanding District Court decision," with the reference to District Court decision apparently referring to two decisions from districts in the respective states of Louisiana and Texas.

Despite the oral comments of Smith, the County requested an opinion from the DOL's Regional Solicitor. In a letter dated August 5, 1988, received by the County on August 11, 1988, the Solicitor confirmed Smith's opinion, based primarily on his interpretation of Ninth Circuit law, that on-site back-up duty was compensable work. Upon the receipt of this letter, a County representative wrote back in November, 1988, continuing to contest the finding of the DOL.

This action was commenced on September 17, 1990.

B. CONCLUSIONS OF LAW RE: STATUTE OF LIMITATIONS

The statute of limitations for an action under FLSA is two years. However, "a cause of action arising out of a willful violation [may] be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). The question in this case is not whether the action was timely filed, but instead how far back the County will be required to pay damages.

As the action was filed on September 17, 1990, there is no question that plaintiffs may recover damages incurred subsequent to September 17, 1988, two years prior to the filing of the action. In this motion, plaintiffs seek an order by summary judgment that they are entitled to damages for the three years prior to the filing of the complaint, back to September 17, 1987, based on allegations that the violation was willful within the meaning of Section 255(a).

The Supreme Court defined willful in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). In *McLaughlin*, the Court held that a violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at 133, 108 S.Ct. at 1681. The currently proposed regulations of the DOL elaborate on this definition of "willful," deeming action willful when it is at variance with advice of the DOL.[1]

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[1]The proposed regulation by the Department of Labor further defines willful:

> A violation shall be deemed to be willful if the employer's actions are at variance with precious advice by the Administrator, or where, as a result of a precious advice of the Administrator, the employer was on notice that it should have inquired further into whether its conduct was in compliance with the Act.

29 C.F.R. § 578.3(c)(8) (56 Fed.Reg. 25170 (June 3, 1991)). Moreover, the summary of the rule states that:

> A violation shall be deemed to be willful ... whenever the employer's

Although this proposed regulation is only proposed and thus not binding, the proposed regulation embodies the notion that an employer, informed by the DOL that its conduct is in violation of FLSA, knows that its conduct is "prohibited by the statute."

It is clear from the evidence presented that the plaintiffs have shown that the County was aware of the DOL's position. Moreover, the County, despite its reference to the subject in its points and authorities, has not presented the court with any evidence that it was unaware of the DOL's position on this matter. Instead, the County chose to ignore the DOL's findings as given to the County by Mr. Smith and then by the Solicitor in favor of its own view of the law. Quite unlike the situation discussed by the Ninth Circuit in *General Electric Co. v. Porter,* 208 F.2d 805, 816 (9th Cir.), *cert. denied,* 347 U.S. 951, 74 S.Ct. 676, 98 L.Ed. 1097 (1954) (employer not in bad faith given "uncertain state of the law"), the law in the Ninth Circuit is settled at this time. *See id.; Kelly v. Ballard,* 298 F.Supp. 1301 (S.D.Cal.1969). As such, the County cannot find safety in its "good faith" challenge to the law based upon decisions in other circuits. Instead, the County, resting in this circuit as it does, must obey the commands of the law in this circuit. Given the well-settled nature of the law, the County's failure to follow the precedent of this circuit clearly was done with knowledge or reckless disregard, and as such was a willful violation of FLSA.

Moreover, even without the DOL finding, given the clear state of the law in this circuit, the County's decision to ignore this law was a violation of the Act. As such, it is not necessary to address plaintiffs argument that the damages be extended back in

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actions are at variance with previous advice by the Administrator, or a Wage-Hour official duly authorized to perform such function, such as where the employer was advised during the course of an investigation of similar or other conduct that the conduct in question constitutes a violation of the Act.

56 Fed.Reg. 25168 (June 3, 1991).

the alternative to the date of the receipt of the written letter on August 11, 1988. Instead, the plaintiffs, as they have shown that the County was aware of the existing interpretation of the law and chose to ignore it, are entitled to damages for the full three years prior to the filing of the complaint. As a result, plaintiffs are entitled to damages beginning on September 17, 1987.

C. CONCLUSIONS OF LAW RE: LIQUIDATED DAMAGES

FLSA provides that an employer who violates the minimum wage or maximum hour provisions "shall be liable for ... the payment of wages lost and an equal amount as liquidated damages." 29 U.S.C. § 216(b). Liquidated damages are not penal in nature, but instead "constitute[ ] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945). As a result, in a FLSA case, "Double damages are the norm, single damages the exception." *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 310 (7th Cir.1986).

Although FLSA makes the award of liquidated damages mandatory, it created an exception where the court has discretion not to award liquidated damages "if the employer shows...that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." 29 U.S.C. § 260. To benefit from this exception, the employer must pass both a subjective and an objective test. *See* 29 C.F.R. § 790.22(b) ("(1) The employers must show ... that the act or omission giving rise to such action was in good faith; and (2) he must show also ... that he had reasonable grounds for believing that his act or omission was not a violation of the ... Act.")

Obviously, if the County's action were "willful" as discussed in the previous section, the County cannot pass this test. Indeed, the County's action were neither subjectively or objectively reasonable. Moreover, a number of decisions have indicated in this area that once DOL has expressed its opinion on an issue, an employer can no longer act to the contrary in good faith. *See, e.g., Hultgren v. Lancaster,* 913 F.2d 498, 509 (8th Cir.1990); *Joiner v. Macon,* 814 F.2d 1537, 1539 (11th Cir.1987); *Richard v. Marriott Corp.,* 549 F.2d 303, 304 (4th Cir.1977); *King v. Board of Education,* 435 F.2d 295, 298 (7th Cir.1970). As a result, the Court must award liquidated damages.

D. CONCLUSIONS OF LAW RE: SLEEP TIME

In the order of April 23, 1991, the court ruled that back-up duty is work even though employees may sleep during some of it. Moreover, the court held that the bargaining agreement could not bar relief. As such, the principles of res judicata bar the County from relitigating the issues of deductions from back-up duty pay for sleep time.

E. CONCLUSIONS OF LAW RE: MONETARY DAMAGES

Incredulously, the County argues that it should be allowed to compensate plaintiffs with time off rather than money damages. The County relies on 29 U.S.C. § 207(o), which provides that County employees may receive "in lieu of overtime compensation, compensatory time off" so long as compensatory time off is pursuant to an agreement between the County and its employees. Indeed, the County alleges that an agreement provides for compensatory time off in lieu of overtime compensation. As a result, the County argues that all overtime compensation due to certain members of the plaintiff class as a result this Court's ruling is payable in compensatory time.

Section 16(b) of FLSA provides that an employer who violates the overtime provision shall be liable "in the amount of ... [the employee's] unpaid overtime compensation." 29 U.S.C. § 216(b). The section goes on to provide for recovery of an "equal amount of liquidated damages." *Id.* These sections indicate that Congress clearly contemplated an award of money, not time off. Moreover, the provision in *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir.1986), for interest on the unpaid compensation in the event no liquidated damages are granted is entirely inconsistent with any type of payment other than money. Having waited until this stage in the litigation, the County is no longer entitled (if such an agreement existed between the parties) to substitute compensatory for unpaid overtime. Instead, the County now must pay damages in amount equal to the unpaid overtime, and these damages must be paid in money.

Additionally, given the enormous amount of time which plaintiffs will have to be credited, it is unlikely that plaintiffs would ever be able to use such time, which would violate 29 U.S.C. § 207(o)(5), which requires that employers which grant compensatory time instead of cash must allow employees to use the accrued time "within a reasonable period." 29 U.S.C. § 207(o)(5). As a result, for this independent reason as well, the County should be required to pay the plaintiffs money, rather than compensatory time.

III

SALARY EXEMPTION

A. FACTUAL BACKGROUND

The County argues that Non-Assistant Deputy Probation Officers ("non-ADPO's") are salaried employees under FLSA. These plaintiffs have set working hours, are required to be at work during these hours, and must record these hours on some form of

time sheet or time card. They must seek and obtain permission to be away from work for a short period during these working hours. Indeed, if any of these plaintiffs leave work for even a few hours without seeking and obtaining permission, they are considered AWOL and are subject to discipline. Additionally, plaintiffs must record any time away from work, including absences of less than one day.

When plaintiffs work extra hours, they receive either compensatory time off or straight-time overtime pay.

Prior to March 8, 1991, the County's Salary Ordinance provided:

> No County officer or employee shall receive any compensation or benefits other than as authorized by law, and no County officer or employee shall be compensated for services not actually performed or for hours not actually worked, except for paid leave or compensation provided for herein.

There was evidence that this provision required that employees who took leave of less than one day but did not have available leave balances to cover the time off be docked for the time off. Moreover, plaintiffs allege, and defendants do not offer counter-evidence, that some plaintiffs were actually docked for absences of less than one day.

On March 8, 1991, less than two months after the Supreme Court's denied certiorari in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir.1990), *cert. denied*,—U.S.——, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991), the County Board of Supervisors amended the Compensation Ordinance to alter this policy. The new ordinance provides:

> For purposes of clarifying the meaning of Section 1.2.6 and the meaning of the provisions in this Compensation Ordinance prior to the March 1, 1990 operative date of

> Section 1.2.6, compensation authorized by law for employees in classes exempt from the provisions of the federal Fair Labor Standards Act who are subject to the salary test set forth in the FLSA regulations includes compensation for periods of absence from work of less than one full regularly scheduled work day for such employees where they have no accumulated paid leave credits applicable to such absence. These employees are salaried employees within the meaning of the FLSA and thereby are entitled to this compensation pursuant to the provisions of the FLSA and its implementing federal regulations. This section merely clarifies compensation rights of employees exempt from FLSA as such rights have existed pursuant to federal law and this Compensation Ordinance.

However, even after March 8, 1991, plaintiffs are required to seek permission to be absent for less than one day, and must use leave time for absences of less than one day if such leave is available. Moreover, sick leave and personal leave is available for plaintiffs' use in as small an increment as one-tenth of an hour.

B. LEGAL BACKGROUND

FLSA excludes from its protection "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

On September 6, 1991, without notice or comment, the DOL promulgated an emergency regulation. The regulation added subpart 541.5d to 29 C.F.R. § 541 as follows:

> A Federal, State or local government employee ("public employee") who otherwise meets the requirements of section 541.118 shall not be disqualified from exemption under sections 541.1, 541.2, or 541.3 of this part on the

> basis that such employee is paid according to a pay system established by statute, ordinance, regulation or public policy under which the employee accrues personal leave and sick leave and, absent the use of accrued leave (because the leave had been exhausted or by the employee's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.

56 Fed.Reg. 45826 (Sept. 6, 1991).

Additionally, the DOL published a proposed regulation which would have maintained the exempt status of employees subject to deductions for absence less than one day prior to the effective date of new section 541.5d if either

> (1) no actual deductions had been made prior to the effective date of the new section or
>
> (2) the employer reimbursed the employees for any actual deductions made prior to the effective date of the new section.

56 Fed.Reg. 45830 (Sept. 6, 1991) (proposed 29 C.F.R. § 541.118 (a)(6)(iii)). This proposed regulation has not yet been promulgated.

C. CONCLUSIONS OF LAW

1. The Burden of Proof

Whether the plaintiffs fall within the exempt class, and as a result are exempt from the coverage of FLSA, is an affirmative defense. As a result, the employer bears the burden of proof on this issue. *See Abshire v. County of Kern,* 908 F.2d 483, 485-86 (9th Cir.1990). Moreover, not only does the employer bear the burden of proof, but the employer "must show that the employees fit 'plainly and unmistakably within [the exemption's] terms.' " *Id.* at 485 *(citing Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960)).

Despite the clear holding of *Abshire*, the County argues that plaintiffs bear the burden of proof on this affirmative defense because of the manner in which plaintiffs filed their pleadings. However, such a shift in burden does not follow from the plaintiffs' pleadings. *See* Wright and Miller, 5 *Federal Practice and Procedure*, § 1276, at 460-61 ("the court should treat plaintiff's references to the defense [in the pleadings] as surplusage. Inasmuch as plaintiff was not under any obligation to plead on the subject of the anticipated defense, ... it is inappropriate for the court to shift the burden of proof on the anticipated defense to plaintiff....") (citations omitted).

As a result, the County bears the burden of proof on the issue of whether plaintiffs are salaried, and thus exempt from the coverage of FLSA.

2. Non-Assistant Deputy Probation Officer Plaintiffs are Not Exempt from the Coverage of FLSA.

The plain language of FLSA excludes from its coverage "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). "The administrative regulations promulgated pursuant to the FLSA establish a 'duties test' and a 'salary test' for determining whether an employee is a bona fide executive." *Abshire*, 908 F.2d at 484 *(citing* 29 C.F.R. § 541.1(a-e); 29 C.F.R. 541.1(f)). "[A]n employer must prove that the employee meets both tests." *Id.* Because the County fails the salary test, it is not necessary to review the duties test.

* *Plaintiffs are subject to loss of pay for absences of less than one day; plaintiffs work set hours and record their time*

Although the County asserts that "no one has testified about punching a 'time clock,' " plaintiffs are required to work set hours, to seek and obtain permission to be away from work dur-

ing those hours, and to record the time that they work on some form of time sheet or time card. Moreover, if plaintiffs fail to seek and obtain permission, they are considered AWOL and subject to discipline. Such rigid attendance and time keeping requirements are not consistent with salaried status. *See Abshire,* 908 F.2d at 486 ("A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed.").

Additionally, for an employee to be considered to be paid on a salary basis, the regulations provide that the employee receive "a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. § 541.118(a)(1). Read concurrently with 29 C.F.R. § 541.118(a)(2), which allows for deductions when the employee is absent from work for more than a day at a time, courts have held that loss of pay for absences of less than one day are indicative that an employee is not a salaried employee. *See, e.g., Dole v. Tony and Susan Alamo Foundation,* 915 F.2d 349, 352 (8th Cir.1990); *Whitmore v. Port Authority,* 907 F.2d 20, 21 (2d Cir.1990). In the Ninth Circuit, the court in *Abshire* directly addressed this issue, holding that "an employee's pay cannot be *subject* to deduction for absences of less than a day." *Abshire,* 908 F.2d at 486.

In this case, clearly up until March 8, 1991, plaintiffs were subject to being docked for absences of less than a day. Prior to that date, the County's Salary Ordinance provided:

> No County officer or employee shall receive any compensation or benefits other than as authorized by law, and no County officer or employee shall be compensated for services not actually performed or for hours not actually worked, except for paid leave or compensation provided herein.

The County provided no evidence that this policy was other than how it reads—that employees were to be docked for hours not worked, even if less than one day.

On March 8, 1991, the County Board of Supervisors amended the ordinance so that it read such that "salaried" employees would not be subject to docking for periods of absence from work for less than one day where they had no accumulated leave time. The new ordinance further stated:

> This section merely clarifies compensation rights of employees exempt from FLSA as such rights have existed pursuant to federal law and this Compensation Ordinance.

Despite the drafting of this last sentence, it is clear that this new ordinance was a change in existing policy. Certainly, the County has not presented evidence to dispute the plaintiffs assertions to the contrary. As such, plaintiffs were subject to docking prior to March 8, 1991.

Moreover, even after March 8, 1991, plaintiffs were required to take leave time for absences of less than a day if such leave was available. Although the Ninth Circuit commented that such leave might be indicative of non-salaried status, it avoided this question in *Abshire*. *Abshire*, 908 F.2d at 487 n. 3 ("a strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as 'salaried' "). Addressing the question at this time, the docking of an employee's leave time for absences from work is as contrary to the notion of salaried status as the docking of base pay. In both instances, the employee's compensation is reduced as a direct consequence of the quantity of hours worked. Such a reduction is entirely inconsistent with salaried status. *See also Thomas v. County of Fairfax*, 758 F.Supp. 353, 366 (E.D.Va. 1991) ("docking of one hour's leave ...

affronts the concept of a salaried executive"); *Knecht v. Redwood City,* 683 F.Supp. 1307, 1312 (N.D.Cal.1987).

* *Plaintiffs receive additional compensation for hours worked in excess of their regularly scheduled hours*

In reference to an overtime pay practice, the Ninth Circuit in *Abshire* stated: "Compensatory time off is provided on an hour-by-hour basis.... Such additional compensation for extra hours worked is ... not generally consistent with salaried status." *Abshire,* 908 F.2d at 486 *(citing Brock v. Claridge Hotel and Casino,* 846 F.2d 180, 184-85 (3d Cir.1988); *Banks v. City of North Little Rock,* 708 F.Supp. 1023, 1024 (E.D.Ark.1988)). *See also Thomas v. County of Fairfax,* 758 F.Supp. 353, 364 (E.D.Va.1991) ("additional pay at an hourly rate for hours worked beyond their regularly scheduled time" is indicative that employees were hourly employees); *York v. Wichita Falls,* 727 F.Supp. 1076, 1082 (N.D.Tex.1989) (overtime pay leads to conclusion that employer "has in fact treated [employees] as nonexempt employees"). In this case, plaintiffs receive either compensatory time off or straight-time overtime pay for extra hours worked. Such payments, contingent on the hours worked, is indicative of hourly, rather than salary, status.

* *Plaintiffs' compensation is calculated by multiplying the number of hours worked times the rate of pay*

The County submitted a portion of its pay ordinance, which provided for the payment of permanent employees at a "bi-weekly rate." Plaintiffs, however, do not dispute this. Instead plaintiffs provided evidence that the policy was a policy in name only, and that the actual practice was that the amount of salary earned during a pay period is computed by multiplying the number of hours worked times the rate of pay. Notably, the County did not provide the Court with any evidence that the policy was followed. As a result, the County has failed to carry its burden of showing that plaintiffs were paid a predetermined amount.

* *Plaintiffs are subject to being suspended without pay for disciplinary reasons*

29 C.F.R. § 541.118(a)(5) provides that: "Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). The regulation further provides an exclusive list of safety rules of major significance. Given the exclusive nature of this regulation, subsection (a)(1)'s requirement which bars deductions for "variations in the quality or quantity of work performed," and the mandate that "[e]xemptions to FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection," *Abshire*, 908 F.2d at 485, penalties for reasons other than those safety rules explicitly provided for in the subsection (a)(5) must be indicative of hourly status. As the County's Civil Service Rules provide for a variety of causes of suspension, including many unrelated to those safety violation explicitly provided for in subsection (a)(5), the treatment of these employees is inconsistent with salaried status as defined in FLSA.

**The Window of Correction is Not Available to the County*

Finally, the regulation provides for a "window of correction", whereby employers can "retroactively restore exempt status to employees who, *inter alia*, had their pay subjected to reduction for absences of less than a day." *Dole v. Malcolm Pirnie, Inc.*, 758 F.Supp. 899, 904 (S.D.N.Y.1991). The window of correction is not available to the County, however, because the County has not provided evidence to the Court that the deductions were due to "inadvertence or error." *Abshire*, 908 F.2d at 489. Equally important, the County should not be able to utilize the window of correction after litigation has begun. To do otherwise would be to eliminate all incentive employers otherwise might have to comply with the law as they could wait until after they were sued to make reimbursement without interest, thereby escaping liability.

Finally, the County has not demonstrated that it has taken affirmative steps "to identify and reimburse exempt employees whose pay had been inadvertently docked." *Fire Fighters v. Alexandria*, 720 F.Supp. 1230, 1232 (E.D.Va.1989). The County's only evidence in this regard is that after March 9, 1991, employees who themselves initiated an inquiry could obtain reimbursement. Such action is not sufficient.

Each of these reasons independently should stop the County from relying on the window of correction. Combined as they are in the present instance, there can be no question that this final attempt by the County to exempt these plaintiffs from coverage under FLSA must fail.

3. The New Emergency Regulation

The Administrative Procedure Act ("APA") requires both notice and an opportunity to comment before the enactment of a proposed regulation. 5 U.S.C. § 553. However, an agency is not required to publish notice of proposed rulemaking if (1) "the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" or (2) the agency finds "good cause" and announces such cause "with the rule." 5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

The law is well-settled that the good cause exemption is to be interpreted narrowly. *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982). It is an "emergency procedure," *id.*, and should only be utilized when " 'delay would do real harm.' " *Id. (quoting United States Steel Corp. v. United States EPA*, 595 F.2d 207, 214 (5th Cir.1979)). Indeed, the only sufficient justification offered by the DOL is if public employers are facing "enormous unforeseen liability" under the existing rule. 56 Fed.Reg. 45825 (Sept. 6, 1991).

In the present context, the liability was not unforeseen. Both the salary basis test and its applicability to public employers has been well settled for sometime. *See* Public Law 99-150, § 6 (providing public employers a grace period in which to comply with the salary test following the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)). The accrual of additional liability alone is not sufficient to enact a regulation without notice and comment, especially in light of the grace period already afforded public employers by Congress. As a result, the emergency regulation is invalid because its promulgation was not in compliance with the APA. A notice and comment period was required.[2]

4. The Proposed Regulation

The County requested that the Court stay the portion of the action related to whether plaintiffs are exempt from the coverage of FLSA until after the Secretary of Labor adopts a proposed regulation. The proposed regulation will exempt employees subject to deductions for absence less than one day if either (1) no actual deductions had been made prior to the effective date of the new section or (2) the employer reimbursed the employees for any actual deductions made prior to the effective date of the new section. 56 Fed.Reg. 45830 (Sept. 6, 1991) (proposed 29 C.F.R. § 541.118(a)(6)(iii)).

Plaintiffs accurately note that there is no guarantee as to when the Secretary of Labor will adopt this proposed regulation. The DOL currently represents that it anticipates such action by June 1992, but there is no guarantee of this. As a result, a stay awaiting the regulation could continue for an indefinite amount of time.

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[2] Because the DOL failed to comply with the notice and comment requirement, it is not necessary to address the question of whether the DOL would have the authority to enter this regulation at all.

Although this is a legitimate concern under any circumstances, it would be lessened if there was the belief that the County would prevail were the stay granted. However, such is not the case.

Importantly, the County has made no factual showing to support its legal assertion that the proposed regulation would change the outcome of this case. As noted, the County bears the burden of proof on this issue, yet the County has not provided the Court with evidence that (1) there were no actual deductions or (2) the County reimbursed plaintiffs. If the proposed regulation were in effect today, it would be of no avail to the County. As a result, there has been no showing to support the stay.

Finally, the deduction requirement is only one of the factors in determining salaried status. As a result, even if the proposed regulation would apply, the County will still have failed to satisfy its burden of proof that the non-ADPO's are exempt from coverage under FLSA.

5. Conclusion

The County has not sustained its burden of showing that plaintiffs are paid on a salary basis. As a result, members of the plaintiff class that the County has sought to exclude are entitled to damages as provided in FLSA.

IV

CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' motions for partial summary judgment on the issue of damages are resolved as follows:

(a) Plaintiffs' motion that plaintiffs' receive damages from September 17, 1987, is GRANTED because the County willfully violated FLSA;

(b) Plaintiffs' motion for liquidated damages is GRANTED in an amount equal to the unpaid back-up duty pay for the entire damage period because the County failed both the subjective and objective tests;

(c) Defendant's motion for deductions from back-up duty pay for sleep time is DENIED because the principles of res judicata bar the County from relitigating this issue which was previously resolved by the Court in an order issued on April 23, 1990; and

(d) Defendant's motion that it be entitled to compensate plaintiffs with time off rather than money damages is DENIED because the statute does not contemplate anything other than monetary damages.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motions for partial summary judgment on the issue of exemption from FLSA is GRANTED because:

(a) the County has failed to show that any of the plaintiffs are exempt from coverage under FLSA;

(b) the new regulation is invalid because there was not a notice and comment period; and

(c) the stay requested by the County is denied because the County has not demonstrated that the proposed regulation will result in a different outcome.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

D.C. No. CV-90-1211-GT-M

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; et al.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO,

Defendant

Filed April 25, 1991

ORDER

Plaintiffs' motion for summary judgment came on for hearing before this Court on April 8, 1991 at 10:30 a.m. Craig Becker, esq. [sic] appeared on behalf of plaintiffs Service Employees Inter-national Union, Local 102 and Probation Officers Association. Lloyd M. Harmon, Jr., County Counsel, appeared on behalf of defendant by and through Miriam Milich, Deputy County Counsel.

This is an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. section 201 *et. seq*. Plaintiffs have moved for partial summary judgment on the issue of liability on their first cause of

29 U.S.C. section 201 *et. seq.* Plaintiffs have moved for partial summary judgment on the issue of liability on their first cause of action concerning the compensability of "on-site back-up duty" under the FLSA. This Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs filing this motion are employees of the County of San Diego employed as Assistant Deputy Probation Officers, Deputy Probation Officers, Senior Probation Officers, and Supervisory Probation Officers.

2. Defendant contends that Deputy Probation Officers, Senior Probation Officers, and Supervisory Probation Officers are not covered under the FLSA. It is undisputed that the Assistant Deputy Probation Officers (ADOP's) are covered by the FLSA. This motion only decides the rights of those officers.

3. The ADPO's are among the officers who work at six rural corrections camp. They regularly work for seven straight days either 9 to 12 hours per day. The schedule is a week off and a week on of work. Officers may sleep at the camp for free during their week on, although they are required to be on duty unless assigned to an on-site back-up shift for that evening.

4. Employees are also regularly assigned to work on-site back-up duty during their seven day shifts. Employees assigned to work on-site back-up duty must obey all rules and regulations applicable to employees on full duty. While employees can pursue leisure activities on the camp, including sleeping and eating, they must remain ready to return to full duty and to perform essential services at any time during the back-up duty shift. They must keep the commanding officers informed of their whereabouts at all times.

5. Employees are compensated for the overtime shifts at the

rate of $18 per shift. If employees are called to full duty during the back-up shift, they are paid the overtime rate in addition to the stand-by duty compensation.

6. The essential conditions of the back-up duty assignment, including the level of compensation, were part of the most recent Memorandum of Agreement between the County of San Diego and the San Diego Probation Officers' Association.

CONCLUSIONS OF LAW

1. While plaintiffs' in their complaint have challenged the County's contentions as to which employees are covered by the FLSA and which are not, that issue is not before the court at this time.

2. Time spent waiting at the request of the employer may be compensable work time. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

3. In determining whether the time spent waiting on the job site must be compensated under the FLSA, the court must inquire if the "time is spent predominantly for the employer's benefit or for the employee's ", considering all of the circumstances of the case. *Armour* at 133.

4. On the facts before the court, the court concludes the employees have been hired by the employer to wait at the camp site should they be needed for any emergency calls. While this may also benefit the employee, because some employees would sleep at the camp during their on weeks without being compensated for this time, it is an assignment primarily for the benefit of the employer. Employees are not free to leave the camp, and they can be disturbed at any time for on-call needs.

5. After examining the agreement between the parties, the court concludes that the parties contemplated this period as "work time" as opposed to the employee's leisure time. While the agreement speaks of employees being on back-up duty "after the normal work period" and of being ready to "return to work" to perform essential services when called, they are assigned to stand by and are to be compensated for the time spent. On these facts, the court must find that the employee was "engaged to wait" and that the time is therefore compensable under the standards of the FLSA. *See Skidmore* at 137.

6. While the court is disturbed by the fact that its ruling essentially rewrites the collective bargaining agreement, which outlines the conditions of the on-site duty and its compensation, the Supreme Court has clearly stated that a union cannot waive the rights of individual employees under the FLSA. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

For these reasons, the motion for summary judgment as to the rights of the Assistant Deputy Probation Officers to coverage under the FLSA for on-site back-up duty is granted.

IT IS SO ORDERED.

Dated: April 22, 1991

GORDAN THOMPSON, JR.
United States District Judge

[NOT FOR PUBLICATION]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 92-56249

D.C. No. CV-90-1211-GT-M

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102; et al.,

Plaintiff,

v.

COUNTY OF SAN DIEGO,

Defendant

Filed August 7, 1995

ORDER

BEFORE: BROWNING, BEEZER and TROTT, Circuit Judges.

Plaintiff-appellees' petition for rehearing of order and supplemental opinion of July 19, 1995 filed on July 27, 1995 is DENIED.

Supreme Court, U.S.
FILED
DEC 4 1995
OFFICE OF THE CLERK

(2)

No. 95-724

In The

Supreme Court of the United States

October Term, 1995

SERVICE EMPLOYEES INTERNATIONAL, LOCAL 102, et al.,

Petitioners,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy
By IAN FAN, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101
Telephone: 619.531.6218

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly determined that the salary basis test of the Fair Labor Standards Act should not be applied to public sector employees, when application of that test is contrary to clear congressional intent.

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Respondent County of San Diego ("County") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 60 F.3d 1346 (1995).

JURISDICTION

A question exists as to this Court's jurisdiction. "The time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed . . . " unless a timely petition for rehearing is filed. Sup. Ct. R. 13.3. In such a case, the time to file a petition for writ of certiorari runs from the date of denial of the petition for rehearing, or if that petition is granted, from the subsequent entry of judgment. *Id.*

In this case, petitioners sought rehearing on two separate occasions. The first petition for rehearing related to the precise question presented in this petition for writ of certiorari, and was denied on July 19, 1995. The second petition for rehearing related to an issue not the subject of this petition for writ of certiorari, and was denied on August 7, 1995.

The clear import of Sup. Ct. R. 13.3 is that the judgment or order for which review is sought triggers the time period for filing the petition for writ of certiorari. Thus, the petition for writ of certiorari, which was filed more than ninety days after the denial of the first petition for rehearing, would appear to be untimely.

STATEMENT OF THE CASE[1]

Under the Fair Labor Standards Act ("FLSA"), employers are required to pay overtime compensation to employees who work more than forty hours in a work week at the rate of not less than time and one-half. 29 U.S.C. § 207(a)(1). However, employees who work in a "bona fide executive, administrative, or professional capacity" are exempt from this overtime requirement. 29 U.S.C. § 213(a)(1). The Department of Labor ("Department") is delegated the authority to issue regulations which "define[] and delimit[] from time to time" the scope of these exemptions. *Id.*

Under regulations promulgated by the Department, an employee must meet a two-part test in order to qualify for an exemption from overtime. The employee must meet both a "salary basis" as well as a "duties" test. *Barner v. City of Oakland*, 17 F.3d 1256, 1259-60 (9th Cir. 1994). Only the salary basis test applies to this case.[2]

The petitioners in this case are employees of the County who assert that they have been treated as exempt

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[1] Pursuant to Sup. Ct. R. 15.2, the County points out a perceived misstatement in the Petition, to wit, the fact that jurisdiction pursuant to 28 U.S.C. § 1343 was never pled in the district court. *See* Excerpt of Record filed in the Ninth Circuit in this case (Fifth Amended Complaint), p. 360.

[2] The duties tests for executive, administrative, and professional employees are set forth at 29 C.F.R. §§ 541.101, 541.201, and 541.301, respectively.

employees under the FLSA. They allege that the County has violated the FLSA's salary basis test, which requires that the employee be paid on a salary basis, that is, receive a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.118(a). As a result, petitioners claim they are not truly exempt from the FLSA's overtime provisions, and should be paid time and one-half for excess hours worked.[3]

As petitioners note, the Department promulgated regulations in 1940 which established the salary basis test. Petition at 4. At that time, the FLSA did not apply to public sector employees; Congress did not extend FLSA coverage to public sector employees until 1974, and it was not until 1985 that the FLSA finally was applied to the public sector.[4] On November 19, 1985, the Department

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[3] Some of the petitioners are not subject to the salary basis test. For example, physicians and lawyers are not subject to the salary basis test. 29 C.F.R. § 541.314(a). However, some of the petitioners are lawyers and some of the petitioners are physicians. *See, e.g.*, Excerpt of Record filed in the Ninth Circuit in this case (Fifth Amended Complaint), p. 372 (Deputy Medical Examiners); p. 373 (Deputy Public Defenders); p. 380 (physician).

[4] In 1976, this Court ruled that the FLSA's provisions could not be applied to state and local governments which engaged in traditional governmental activities. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). However, in 1985, this Court reversed *National League of Cities*, and permitted the application

announced that it would be undertaking a revision of the FLSA regulations, including whether the salary basis test should be increased or eliminated. 50 Fed.Reg. 47,696 (1985). Nothing happened for over a year. Then on January 16, 1987, the Department again announced that it expected to conduct rulemaking on the FLSA regulations during that year. 52 Fed.Reg. 2,019 (1987). Such comprehensive rulemaking never occurred in 1987, or in any year since.

Since 1987, the Department has only taken limited action with respect to the salary basis test. On January 9, 1987, "[t]he Department initially attempted to address the special circumstances of the public sector" with the adoption of a non-enforcement policy which permitted employers to dock pay for absences of less than one day. 57 Fed.Reg. 37,668 (1992). However, this non-enforcement policy did not preclude employees from suing. *Id.* (rights under 29 U.S.C. § 216(b) not affected).

Thereafter, in 1991 the Department adopted an interim final regulation which provided that public sector employees would not lose their FLSA exemption because they received leave without pay ("LWOP") for absences of less than one day. 56 Fed.Reg. 45,826 (1991). The Department also proposed a regulation which sought to restore exempt status to employees who in the past had received LWOP for absences of less than one day, and

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of the FLSA to state and local governments. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985).

who had been subsequently reimbursed for that leave. 56 Fed.Reg. 45,829 (1991).[5]

The interim final regulation was modified in 1992, and established that public sector employees would not lose their FLSA exemption because accumulated leave is reduced or LWOP used for absences of less than one day. 57 Fed.Reg. 37,677 (1992). In promulgating the 1992 regulation, the Department explained that public entities such as the County have pay systems which are based upon notions of public accountability, under which "governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds." 57 Fed.Reg. 37,667 (1992). "As a consequence, few public employers compensated employees in a manner that would satisfy the [salary basis test] required by the regulations." *Id.*

The Department admitted that it "first observed this anomaly" in 1985. *Id.* As the Department observed,

> "[i]n light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments [i.e., the salary basis test] simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. *The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and*

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[5] That proposed regulation was later withdrawn. 57 Fed.Reg. 37,678 (1992).

thus were inappropriate as applied in the public sector."

57 Fed.Reg. 37,672 (1992) (emphasis added).

REASONS FOR DENYING THE WRIT

I. There Are No Direct Conflicts With Decisions From Other Courts Of Appeals

Petitioners argue that the opinion of the Ninth Circuit conflicts with the express holdings of the Seventh and D.C. Circuits, as well as with implicit holdings of six circuit courts of appeals. They are mistaken.

1. The first case discussed by petitioners is *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586). In *Mueller*, engineers employed by the State of Wisconsin were subject to having pay docked in two circumstances: (1) for absences of less than one day; and (2) for disciplinary infractions that did not breach a major safety regulation. *Id.* at 440. The Seventh Circuit found that the Department's salary basis regulation, 29 C.F.R. § 541.118, as amended by 29 C.F.R. § 541.5d, was valid. *Id.* at 441-42. Because the salary basis regulation precluded the loss of less than a week's pay for disciplinary infractions that were not a breach of a major safety regulation, *see* 29 C.F.R. § 541.118(a)(5), the engineers won.

Although the Seventh Circuit decided *Mueller* more than six months after the Ninth Circuit initially ruled in

this case,[6] *Mueller* never mentioned the Ninth Circuit's decision. Nor did the *Mueller* court discuss the Ninth Circuit's rationale, which was grounded on the Department's "firm conviction that its earlier iteration of the salary test conflicted with congressional intent." Appendix to Petition ("App.") App. 12a-13a; 41a-42a. The Ninth Circuit's "firm conviction" statement was based upon the Department's explanation of its reasons for adopting 29 C.F.R. § 541.5d, which was quoted at length by the Ninth Circuit. *See* App. 12a; 40a-41a. For whatever reason, the *Mueller* court ignored this analysis. Thus, the Seventh Circuit never disapproved either the Ninth Circuit's holding or its reasoning, and accordingly there is no direct conflict between the decisions.

Even if some sort of conflict existed,[7] that conflict is not worthy of certiorari. Because *Mueller* never discussed nor recognized this alleged conflict, the Ninth Circuit's reasoning could still be adopted by a different Seventh Circuit panel. Alternatively, a future Seventh Circuit panel might at least explain why the Ninth Circuit's logic should not be followed, in which case a direct conflict would be established.

Moreover, the two cases concern different iterations of the salary basis regulation. The Ninth Circuit decision

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[6] The Ninth Circuit's original decision in this case was filed on October 5, 1994. *See* Appendix to Petition 30a.

[7] The State of Wisconsin argues that *Mueller* creates an indirect conflict with the Ninth Circuit. *See* Petition for Certiorari in *Mueller*, at 10. In *dicta*, the Eighth Circuit implies that a conflict exists between the two decisions. *See Auer v. Robbins*, 65 F.3d 702, 710 n.6 (8th Cir. 1995).

held that the salary basis regulation, "as it existed before the [Department] suspended its application to public employers on September 6, 1991," was entirely invalid. App. 13a. On the other hand, *Mueller* held that the salary basis regulation, "as amended by 29 C.F.R. § 541.5d," was valid. *Mueller*, 54 F.3d at 441-42. The amendment to the salary basis test referred to in *Mueller* occurred on August 19, 1992. *See* 57 Fed.Reg. 37,666 (1992). In other words, the decisions concern different regulations, one which is pre-September 6, 1991, and the second which is post-August 19, 1992. The cases are thus factually dissimilar, which in turn renders any conflict distinguishable.

2. Additionally, *Kinney v. District of Columbia*, 994 F.2d 6 (D.C.Cir. 1993), does not conflict with the Ninth Circuit's decision. *Kinney* refused to consider the argument that the salary basis test did not apply to the public sector because that argument was not made before the trial court. *Id.* at 10. Its discussion of the Department's statements was limited to whether such statements were an intervening change in the law, which would permit the court to entertain a new argument on appeal. *Id.* The court found that such statements were not an intervening change in the law. *Id.* Thus, at best the section of *Kinney* relied upon by petitioners is *dicta*.

3. Finally, none of the remaining cases and circuits cited by petitioners at pages eight and nine of their Petition are in conflict with the Ninth Circuit's decision. As petitioners note, those cases "applied" the salary basis test which the Ninth Circuit held invalid. However, the issue of the invalidity of the salary basis test was never

raised in those cases.[8] It therefore cannot be said that those cases "implicitly" held that the salary basis test was valid, since that precise issue was not before any of the courts.

II. The Question Of Federal Law Decided By The Ninth Circuit Need Not Be Settled By This Court

Petitioners argue that this Court should step in and settle the question of the applicability of the salary basis test to public employers. What they ignore is the duties test requirement for exemption from the FLSA. *See* discussion *supra* and n.2. The requirement that exempt positions have duties that fall within the administrative, professional, and executive exemptions ensures that the underlying goals of the FLSA are being met, and that only persons in such bona fide capacities are being exempted. *See* 29 U.S.C. § 213(a)(1).

In addition, petitioners do not merit the intervention of this Court. They fail to state the obvious: that they are white-collar workers seeking to take advantage of a perceived loophole in the system. They are already receiving either compensatory time off or straight-time overtime pay for extra hours worked. *See* App. 70a.

The Ninth Circuit decision should be permitted to be addressed on the merits by other circuits, which will either adopt or reject its reasoning. If another circuit court rejects the Ninth Circuit's reasoning, then a true conflict of decisions between the circuits will arise which might

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[8] With the exception of *Kinney*, which as noted above refused to consider the issue.

justify certiorari. However, at this moment, no true conflict exists, and nothing compels this Court's intervention at this time.

III. The Ninth Circuit's Decision Is Consistent With Decisions Of This Court

Petitioners' final argument asserts that the Ninth Circuit's decision conflicts with this Court's prior decisions in four different respects. Petitioners are wrong.

1. Petitioners initially argue that the Ninth Circuit's decision contravened this Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Reviewing the Ninth Circuit's reference to the FLSA's legislative history, petitioners assert that the salary basis test does not conflict with Congress's unambiguous intent. Petition at 14.

In making this argument, petitioners describe *Chevron U.S.A.* as holding that courts should not invalidate legislative regulations unless they conflict with the unambiguous intent of Congress. *Id.* at 11. This misstates the test enunciated in *Chevron U.S.A. Chevron U.S.A.*'s analysis is instead two-fold: (1) if Congressional intent is clear, the court must give effect to this clear "unambiguously expressed intent of Congress," 467 U.S. at 843; and (2) if Congress's intent is not clear, then the court must determine if the agency's construction of the statute is "permissible." *Id.* Put another way, courts must "reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

The Ninth Circuit followed this analysis. As it noted, Congress clearly intended that the executive and administrative exemptions should apply to the public sector. App. 8a; 21a (quoting from the Department's brief). What petitioners dispute, however, is the Ninth Circuit's logic, which reasoned that having intended an exemption to apply, Congress must also have intended that the salary basis test could not defeat that exemption. Yet this logic is merely an extension of the clear congressional intent: Congress could not have meant to grant public employers an exemption, only to preclude the use of that exemption by the salary basis test. Doing so would lead to an absurd result, which should be avoided. *See United States v. Turkette*, 452 U.S. 576, 589 (1981).

The Ninth Circuit's logic was not flawed. The Ninth Circuit found, as did the Department, that public accountability principles rendered impossible the use of those exemptions by public employers. App. 13a (quoting the Department's explanation for promulgation of 29 C.F.R. § 541.5d). Public employers were thus caught in a classic "Catch-22." On the one hand, Congress intended public entities to exempt certain employees from the FLSA. On the other hand, the salary basis regulation adopted by the Department made it impossible for public entities to take advantage of the exemptions.

Petitioners seek to illustrate their argument by reference to the Court's own judicial clerks. What they fail to note is that this Court's law clerks are not subject to the federal government's competitive service requirements, and that the FLSA only applies to units of the federal judiciary that are subject to competitive service. *See* 29 U.S.C. § 203(e)(2)(A)(iii) (persons employed in such units

are not "employees" within the meaning of the FLSA). Additionally, exempt status for federal employees is not contingent upon meeting the salary basis test. *See* 57 Fed.Reg. 37,667 (1992) (exempt status under Office of Personnel Management regulations does not include a salary basis requirement).

In short, the salary basis test is strictly an invention of the Department, and there is nothing talismanic about it. The Ninth Circuit's decision does not conflict with *Chevron U.S.A.*[9]

2. Petitioners' next two arguments relate to extensions and amendments to a statute when an agency has a longstanding interpretation of the statute, or when the agency's interpretation has been brought to the attention of the public and Congress with no attendant change by Congress. Petition at 18-20. Under these circumstances, petitioners claim that Congress intended that the salary basis test apply to the public sector.

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[9] Petitioners also argue that *Chevron U.S.A.* has been violated in other instances. However, a close reading of those subsidiary arguments (found at Petition 14-18) discloses that petitioners do not argue that there is an actual conflict with *Chevron U.S.A.* Thus, petitioners' section III(1)(b) argument is actually directed to public policy considerations. Petitioners' section III(1)(c) argument questions the failure of the Ninth Circuit to give deference to the Department's interpretation. Yet that argument does not conflict with *Chevron U.S.A.*, which sets forth circumstances in which an agency's interpretation will not be followed. These arguments thus assert error because of an alleged "misapplication of a properly stated rule of law," for which certiorari is rarely granted. *See* Sup. Ct. R. 10.

However, as this Court has recently stated, "congressional silence 'lacks persuasive significance,' particularly where administrative regulations are inconsistent with the controlling statute . . . ." *Brown v. Gardner*, 513 U.S. ___, 115 S.Ct. 552, 557 (1994) (citations omitted). Moreover, "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (citation omitted). This is because "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). Congress's inaction is persuasive evidence of nothing.

3. Petitioners finally claim that the Ninth Circuit impermissibly acted in an area reserved for the executive branch. This is an argument more appropriately reserved for a merits brief, and does not fall within the considerations set by this Court for granting certiorari.

CONCLUSION

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy

By IAN FAN, Deputy
Counsel of Record for Respondent

(3) No. 95-724

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JONATHAN P. HIATT
General Counsel
Service Employees
International Union, AFL-CIO
1313 L St., N.W.
Washington, D.C. 20005
(202) 898-3200

HAROLD CRAIG BECKER*
Associate General Counsel
Service Employees
International Union, AFL-CIO
940 W. Adams, Suite 400
Chicago, Ill. 60607
(312) 455-1500

*Counsel of Record
Attorney for Petitioner

7026 1100

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Petitioners file this Reply Brief in support of their Petition for a Writ of Certiorari solely to address the jurisdictional argument made in Respondent's Brief in Opposition. Respondent's argument that this Court lacks jurisdiction over this case even though the Petition for a Writ of Certiorari was filed within 90 days of the Court of Appeals' denial of a timely petition for rehearing rests on an erroneous statement of the law.

THE PROCEDURAL HISTORY

Petitioner-Plaintiffs' Complaint in this action stated two claims — the "standby claim" and the "exemption claim." The standby claim was that time spent on on-site back-up or night duty was work for which the Defendant-Respondent County of San Diego (hereinafter the "County") did not compensate Plaintiffs in accordance with the Fair Labor Standards Act (hereinafter the "FLSA"). Plaintiffs who worked for the County in the classifications of Assistant Deputy, Deputy, Senior and Supervisory Probation Officer; Nurse; and Park Ranger were party to the standby claim. The exemption claim was that the County had unlawfully treated all Plaintiffs working in classifications other than Assistant Deputy Probation Officer as exempt from the protection of the FLSA.

All Plaintiffs prevailed on all claims in the District Court. In its initial decision, the Court of Appeals affirmed the judgment in favor of the Assistant Deputy Probation Officers and the Nurses on the standby claim and reversed the judgment in favor of the Park Rangers on the standby claim as well as the judgment in favor of all non-Assistant Deputy Probation Officer Plaintiffs on the exemption claim.

After the initial decision by the Court of Appeals, timely petitions for rehearing were filed by one Plaintiff, a Park Ranger, and the County. The single Plaintiff Park Ranger's petition concerned his standby claims.[1] The County's petition concerned the

Assistant Deputy Probation Officers' and Nurses' standby claim. All non-Assistant Deputy Probation Officer Plaintiffs petitioned only for rehearing en banc on their exemption claim.

The Court of Appeals denied the single Plaintiff Park Ranger's petition for rehearing and the non-Assistant Deputy Probation Officer Plaintiffs' petition for rehearing *en banc*, but granted, in part, the County's petition for rehearing. The Court reversed its earlier decision upholding the application of a three year statute of limitations to the Assistant Deputy Probation Officers' standby-claim and the award of liquidated damages to these Officers. The Assistant Deputy Probation Officers, who are not Petitioners in this Court because they are not party to the exemption claim, then petitioned for rehearing. This petition was timely because it addressed that portion of the second Court of Appeals' decision that altered the original decision.[2] The Court of Appeals denied the petition.

The County concedes that the Petition for a Writ of Certiorari was filed within 90 days of the denial of the timely petition for rehearing.

ARGUMENT

Neither the fact that the second petition for rehearing did not raise the question stated in the Petition for a Writ of Certiorari nor the fact that it was the second petition for rehearing

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[1] Although it is not relevant to the question of jurisdiction, the County is therefore incorrect when it states that the first petition for rehearing concerned the issue currently before this Court. Opposition at 1.

[2] The petition for rehearing was also not redundant of an answer to the County's earlier petition because the Court of Appeals did not request an answer even though it granted the County's petition and no answer is permitted unless it is requested. *See* Fed.R.App.P. 40(a).

filed by Plaintiffs is relevant to the question of whether the Petition for a Writ of Certiorari was timely filed.

Supreme Court Rule 13.4 expressly addresses these points. The Rule states that the time for filing a petition "runs from the date the judgment or decree sought to be reviewed is rendered." However, the Rule then states, "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Thus the only question under Rule 13.4 is whether the petition for a writ of certiorari was filed within 90 days of the denial of a timely petition for rehearing. The Rule does not make tolling contingent on the petition raising the same question raised in the petition for a writ of certiorari and it does not limit the tolling effect to the first petition for rehearing that is timely filed.3

The County asks this Court to read Rule 13.4 as if it read: "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment *so long as the petition for a writ of certiorari states the same question raised in the timely petition for rehearing and the timely petition for rehearing is the first one filed in the case.*" This is not what the Rule says.

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[3] Given the liberal rules of joinder of both parties and claims in the District Courts, *see* Fed.R.Civ.P. 18, 20(a), the fact that Rule 13.4 explicitly states that a petition filed by "any party" in the Court of Appeals tolls the running of the time period for all parties, also strongly suggests that the petition need not raise the same question raised in the petition for a writ of certiorari in order to toll the running of the time for filing a petition for a writ of certiorari.

This Court has itself stated the tolling rule without reference to the content of the petition for rehearing or the number of such petitions filed. *In Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court stated, "Since *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942), it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Id.* at 45.

The rationale underlying the unambiguous tolling rule also exposes the error in the County's argument. In *Jenkins*, this Court explained, "'[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.' . . . To put the matter another way, while the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Id.* at 46 (quoting *Pink*, 317 U.S. at 266). Thus in *Craig v. United States*, 298 U.S. 637 (1936), this Court dismissed a petition for a writ of certiorari on the grounds that it was premature because a petition for rehearing was pending in the Court of Appeals. In other words, if Petitioners had filed their Petition for a Writ of Certiorari at the time the County argues they should have filed, it would have been dismissed as premature. The filing of the second petition for rehearing "suspend[ed] the finality" of the new judgment — including its denial of the initial petition for rehearing. There was thus "no 'judgment' to be reviewed" — neither the first or second — until the second petition for rehearing was denied.

The principal reference work on Supreme Court practice confirms Petitioners' reading of the unambiguous language of Rule 13.4. According to Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), the filing of a petition for rehearing in a court of appeals tolls the running of the period for filing a petition for a writ of certiorari in this Court for all parties "regardless

of whether the other parties would raise the same or different issues as raised in the petition for rehearing." *Id.* at 286.

Finally, the illogic of the County's position can be illustrated with a simple hypothetical. If the Court of Appeals' initial decision had reversed the District Court's extension of the statute of limitations and award of liquidated damages on the standby claim and the Assistant Deputy Probation Officer Plaintiffs had moved for rehearing on these issues, there could have been no dispute that the other Plaintiffs' time to file a petition for a writ of certiorari concerning any question would have been tolled under Rule 13.4. There is no conceivable reason why this should be true under these hypothetical facts, but not in this case where the Assistant Deputy Probation Officer Plaintiffs had no reason to petition for rehearing until after the second decision of the Court of Appeals.

The Petition was timely filed.

Respectfully submitted,

JONATHAN P. HIATT
General Counsel
Service Employees
International Union, AFL-CIO
1313 L St., N.W.
Washington, D.C. 20005
(202)898-3200

HAROLD CRAIG BECKER*
Associate General Counsel
Service Employees
International Union, AFL-CIO
940 W. Adams, Suite 400
Chicago, Ill. 60607
(312)455-1500

*Counsel ofRecord
Attorney for Petitioner